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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 242

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., OWNER OF THE SPANISH STEAMSHIP "NAVEMAR", PETITIONER,

vs.

SPANISH STEAMSHIP "NAVEMAR", HER ENGINES, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A-15102

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR," Libellant,

vs.

Spanish Steamship "NAVEMAR," Engines, etc., and RAFAEL CRESPO, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, etc.

DOCKET ENTRIES

1936.

Dec. 7. Libel and stipulation for costs filed.

" 7. Process in rem and personam issued, returnable December 9, 1936.

" 7. Order filed re process and service, etc.

" 9. Before Galston, J. Process in rem and personam returned, Steamship, her engines, etc., attached on December 7, 1936, and at the same time and on board said steamship, each of the respondents above named served with a copy of the process and the libel. Proclamation made. Bigham, Englar, Jones & Houston appear for libellant. Jesse L. Rosenberg appearing specially for the respondents. Attorney for the respondents given until 2:00 P. M. to file appearance, stipulation for costs and answer. Hearing on issues set for 2:00 P. M. December

[fol. 2] 9, 1936.

Dec. 9. Before Galston, J. Trial begun and adjourned to December 11, 1936, at 2:00 P. M.

" 11. Before Galston, J. Trial continued and adjourned to December 14, 1936, at 11:00 A. M.

" 14. Before Galston, J. Trial resumed and concluded. The Court renders an opinion (Oral). Decree for libellant.

" 14. Final Decree filed. The United States Marshal directed to deliver possession of Steamship to libellant, etc.

DOCKET ENTRIES—Continued

1936.

Dec. 15. Order to show cause filed why Arturo Garcia, et al., should not be punished for contempt of Court, in failing to obey its final decree entered on December 14, 1936, and resisting the efforts of the United States Marshal in endeavoring to execute final decree after having been duly notified, etc.

" 15. United States Marshal's return filed. Certified copy of order to show cause served on Arturo Garcia, et al.

" 15. Before Galston, J. Hearing on order to show cause why Arturo Garcia, et al., should not be punished for contempt of Court in failing to obey its final decree, etc. Hearing adjourned to December 16, 1936, at 10:30 A. M.

" 16. Before Galston, J. Hearing on order to show cause why Arturo Garcia, Rafael Crespo, et al., Thomas A. McDonald, attorney for all respondents served same respondents in person as noted on December 15, 1936. Motion argued.

[fol. 3] Decision reserved. Submit December 17, 1936.

Dec. 16. Affidavits filed (3) (Arturo Garcia; Luis Careaga and Thomas A. McDonald).

" 16. United States Marshal's return filed. Certified copy of final decree served on crew of Steamship, etc.

" 16. Order to show cause filed why the default of the respondents should not be reopened and why Fernando de los Rios, Ambassador of the Republic of Spain, should not be permitted to appear specially as claimant of Steamship "Navemar," and why the decree heretofore entered herein on December 14, 1936, should not be set aside and vacated and why process theretofore issued should not be vacated and why the United States Marshal should not turn back said steamship to Luis Careaga, etc.

" 22. By Galston, J. Opinion rendered on hearing on order to show cause why Arturo Garcia, et al., should not be punished for contempt of Court, etc. Motion denied, without prejudice. Settle order on notice. (See opinion.)

DOCKET ENTRIES—Continued

1936.

Dec. 23. Exceptions of libellant filed and return of libellant, etc.

" 23. Supplemental suggestion filed.

" 23. Before Galston, J. Hearing on order to show cause why the default of the respondents should not be reopened, etc. Motion argued. Decision

[fol. 4] reserved. File briefs December 24, 1936.

Dec. 31. By Galston, J. Opinion rendered on order to show cause why default of respondents should not be reopened. Exceptions of libellant sustained and motion denied. Permission, however, granted to the Spanish Ambassador to present another application for leave to appear provided such application conforms to the views hereinbefore set forth. Settle order on notice. (See opinion.)

1937.

Jan. 4. Order filed on order to show cause why the default of respondents should not be reopened, etc., in accordance with opinion.

" 11. Order to show cause filed why the default of respondents should not be reopened and why Fernando de los Rios, Ambassador of Republic of Spain, without waiving any favors, etc., should not be permitted to appear as claimant.

" 12. Return of libellant and exceptions to order to show cause filed.

" 12. Before Galston, J. Hearing on order to show cause why default of respondents should not be reopened and why Fernando de los Rios, Ambassador of the Republic of Spain, should not be permitted to appear as claimant. Motion argued. Decision reserved. Submit January 19, 1937.

" 19. Affidavits filed.

[fol. 5]

Jan. 28. By Galston, J. Opinion rendered on hearing why default should not be reopened, etc. Application denied without leave to renew. Settle order on notice. (See opinion.)

Feb. 3. Order filed vacating the order to show cause issued on January 8, 1937, and denying the second

DOCKET ENTRIES—Continued

1937.

application of Fernando de los Rios, etc., to vacate the final decree and reopen default, etc. Exceptions and objections filed by libellant to said order to show cause and to said second application sustained:

Feb. 4. Petition and order for appeal filed.
" 4. Notice of appeal filed (C. C. A.).
" 4. Assignment of errors filed.
" 4. Restraining order filed and affidavits. (Certified copy, C. C. A.).

[fol. 6] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The Libel and Complaint of Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar," her engines, etc., against Spanish Steamship "Navemar," her engines, etc., and against all persons intervening for their interest therein, and against Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, being the persons on board and in physical control of the Spanish Steamship "Navemar," now lying at anchor on Red Hook Flats, in the Borough of Brooklyn, Eastern District of New York, in a cause of possession, civil and maritime, alleges as follows:

First. Libellant Compania Espanola de Navegacion Maritima, S. A., is a corporation duly organized and existing under and by virtue of the laws of the Republic of Spain, and at all the times hereinafter mentioned, was, and still is, the true and only owner of the Spanish Steamship "Navemar," now lying in the port and Eastern District of New York and within the jurisdiction of this court, and the sole person entitled to her possession, and had possession of said vessel as such owner until deprived of her as hereinafter set forth.

[fol. 7] Second. In the month of October, 1936, before the filing of this libel, and while the master, officers and crew

employed by libellant were on board the said steamship, the members of the crew of said steamship "Navemar" wrongfully, unlawfully and forcibly deprived libellant of possession of said steamship and have since continuously withheld her from libellant, by unlawfully and forcibly seizing, asserting and exercising exclusive control over said Steamship "Navemar," contrary to libellant's interests and instructions, and by forcibly depriving the said master of all opportunity to continue in command on behalf of libellant; and said wrongful possession and seizure of said steamship by respondents has since been further enforced by respondents while said master was temporarily ashore by threatening to detain and unlawfully confine the master, Manuel Martinez Diaz, if he should again get on board said Steamship "Navemar" and attempt to exercise any authority on behalf of libellant Compania Espanola de Navegacion Maritima, S. A.; and respondents as a committee representing the said crew have since further enforced said unlawful seizure and control by unlawfully refusing to permit said Manuel Martinez Diaz to resume command of said steamship on behalf of Compania Espanola de Navegacion Maritima, S. A., on proper demand made by him; and said respondents have since further wrongfully and unlawfully continued to exercise control by continuously, day and night, maintaining a guard on board said steamship to prevent libellant from resuming possession of her; and said respondents as a committee representing the said crew have [fol. 8] informed said master, Manuel Martinez Diaz, that they intend to continue permanently in possession and ownership of said Steamship "Navemar." The aforesaid seizure and withholding of said steamship from libellant was not done in accordance with any authority conferred on said crew or respondents by law, or by the libellant, Compania Espanola de Navegacion Maritima, S. A., but was done by them wrongfully and without authority of law, and wholly without title, right or interest of said crew or respondents.

Third. Libellant Compania Espanola de Navegacion Maritima, S. A., is, and at all times hereinafter mentioned has been, the duly registered and acting owner of the said Spanish Steamship "Navemar" and entitled to possession of her.

Fourth. All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States, and the said Steamship "Navemar" is now within the jurisdiction of this Honorable Court.

Wherefore, libellant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamship "Navemar," her engines, etc., and that the said respondents, Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, and any and all other persons claiming to have any interest in said Steamship "Navemar," may be cited to appear before this Honorable Court and show cause why [fols. 9-10] possession of the said steamship should not be delivered to the libellant as having full title to the possession thereof and that the said respondents Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez may be condemned to pay to the libellant its damages and costs in the premises, and that libellant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

Bigham, Englar, Jones & Houston, Proctors for Libellant, Office & P. O. Address, No. 99 John Street, Borough of Manhattan, City of New York.

Duly sworn to by Marcelino Garcia. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MARSHAL'S RETURN ON PROCESS IN REM AND PERSONAM

In obedience to the within Monition, I attached the Spanish Steamship, engines, etc., at present located at anchor off Red Hook Flats, N. Y. Harbor, and at the same time, serve Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, on board said Spanish Steamship "Navemar," each and every one with a copy of the attached Process in Rem and Personam, as well as with a copy of the libel filed in this Court, giving them due notice, and all persons concerned that this Court will on the 9th day of De-

cember, 1936, proceed to the trial and condemnation thereof should no claim be interposed for the same.

Albert C. Benninger, U. S. Marshal, E. D. N. Y., by (Signed) Thomas A. Hanley, Deputy U. S. Marshal.

This on the 7th day of December, 1936.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FIXING TIME FOR RETURN OF PROCESS—December 7, 1936

On the verified libel and complaint filed this day in the above entitled cause, and on motion of Messrs. Bigham, Englar, Jones & Houston, Proctors for Libellants, and good cause appearing therefor,

It is Ordered, that process against respondents in the above entitled cause be, and the same hereby is, made returnable at 10:30 o'clock A. M., on Wednesday, the 9th day [fol. 13] of December, 1936, before the above entitled court, in the Court Rooms thereof, in the United States Court House and Federal Building, Borough of Brooklyn, City and Eastern District of New York; and

It is Further Ordered, that the said process shall be served on each of the respondents by the Marshal of the above entitled Court as promptly as possible after this order has been filed, and that a copy of this order be delivered by said Marshal to each of said respondents at the time he serves process on them.

Clarence G. Galston, U. S. D. J.

[fol. 14] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

No. 15,102A

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR," Libellant,

vs.

Spanish Steamship NAVEMAR, Her Engines, etc., Claimant, and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents

Case

Before Hon. Clarence G. Galston, U. S. D. J.

Brooklyn, N. Y., December 9, 1936, 2:00 p. m.

APPEARANCES

Bigham, Englar, Jones & Houston, Esqs., Proctors for Libellant, by T. Catesby Jones, Esq. and James W. Ryan, Esq., of Counsel.

Jesse Rosenberg, Esq., Appearing specially for Luis Careaga, Acting Consul General of Spain, by Charles W. Hagen, Esq. and Henry C. Eidenbach, Esq., of Counsel.

[fol. 15] COLLOQUY

Mr. Rosenberg: Your Honor, I am Mr. Rosenberg. When I was retained in this matter yesterday I was sent out by Judge Lewis on the trial of a Supreme Court action, and about the same time I was engaged to take up this matter representing the seamen and the Consul General. I picked a jury yesterday, and I am technically on trial now, although I haven't actually begun the trial of the case.

I asked Mr. Justice Lewis if he would let me come up here in this case. Mr. Charles Hagen is associated with me, and I have filed, or rather, I am filing an appearance solely for the purpose—I will read the appearance, "solely for the purpose of contesting the jurisdiction of this Honorable Court, and for the purpose of obtaining an extension of time so as to enable the said Luis Careaga to communicate with the Honorable, the Ambassador of Spain, duly ac-

credited to the United States of America and now in Washington, D. C., and with the Honorable, the Secretary of State of the United States of America, and that the said Luis Careaga does not appear generally in this action."

Now, if your Honor please, if there is any question, you understand things are quite chaotic with reference to the Spanish situation, and so with my being on trial, technically on trial, with my witnesses called, it has been difficult for me to carry on in this matter as well as I would, I think, normally. And so I have asked Mr. Hagen to come in, and he has had insufficient time to properly advise Mr. Careaga.

And furthermore, I wish, as this shows, I wish sufficient time so that I may get in touch with the Ambassador, and [fol. 16] then through the State Department. And any assurance that the State may wish as to the physical presence of the ship, I stand ready to give in any suitable form as your Honor thinks necessary.

The Court: Of course, there is no disposition on the part of the Court to rush this matter unseemly, with unseemly haste. But the detention of a vessel is a serious thing, and the law in regard to possessory libels requires prompt hearings.

Mr. Rosenberg: For myself, I assume that I will be in the trial of the case that I am expected to go on with this afternoon, probably this afternoon and a great deal of tomorrow, and I would like to participate in the preparation of this matter. And we would like, with whatever assurance we can give the Court that the ship will physically be here, we would like to have ample opportunity to——

The Court: You do not have to give that assurance because the ship is now in the custody of the Marshal, and it would be hazard for anybody to interfere with that custody.

Mr. Hagen: We will be in court with the Spanish Ambassador, I believe, this afternoon or the first thing in the morning, and I trust your Honor will give sufficient time for us to produce whatever is necessary.

The Court: Well, Mr. Ryan, what have you to say about this?

Mr. Ryan: This matter is very urgent from our point of view, and I should think offhand that he should not have accepted this retainer in an urgent matter like this when he knew he was in a trial in some other court.

Mr. Hagen: I am free, but I must have authority from [fol. 17] the Ambassador before I can proceed.

Mr. Ryan: I was going to say, I think a request for an extension of time to answer is well-settled in this District is a general appearance. If they want to enter special appearance it will require them to promptly comply with the Court's rule.

The Court's rules are framed by all the Judges, they are not something just discretionary with your Honor. This rule provides that this kind of a proceeding, a libel for possession, is a summary one and the answer shall be filed on the return date. These people are not now making anything in the nature of an answer, anything in the nature of a statement of fact. The man who came this morning said he was appearing for five Spaniards, he said nothing about the Consul at all until after I had argued and presented the matter, and then he added the words "and the Consul."

Now, so far as the Consul is concerned, the Consul has no authority under the United States Supreme Court decisions to appear in this court and claim immunity for his ship. The Supreme Court has decided that.

Mr. Hagen: We understand that.

The Court: I do not understand that Mr. Hagen or Mr. Rosenberg make the plea for delay because of anything in connection with the Spanish Consul. Mr. Hagen says he wants authority to appear, and he has got to get in touch with the Ambassador, the Spanish Ambassador. That would be all right, but he is somewhat embarrassed in asking for an adjournment when he is not putting in a general appearance.

[fol. 18] Mr. Hagen: If your Honor please, it seems to me it is most unusual to have a possessory libel heard so very quickly. I was curious to know, I have been served with no papers nor have I seen any papers, any affidavit or anything which was presented to the Court to persuade the Court to act so quickly, particularly in a complicated matter.

The Court: According to our rule they do not need anything other than the rule of this Court. That, Mr. Hagen, is explicit.

Mr. Hagen: May I say this, that this libel which is verified is based upon information which Mr. Garcia Diaz obtained from the master of this vessel.

The libel alleges that the vessel was seized without authority, that the vessel was taken over by certain men on

the vessel. I have here the log-book of that very master, that is, I have a copy of it, it is in Spanish, and this very master who has sworn to that——

The Court: If I may interrupt you, Mr. Hagen, either you appear generally or you appear specially.

Mr. Hagan: I must appear specially.

The Court: All right.

Mr. Hagen: They are trying now to force us into the position where we appear generally for the Consul. In other words, we cannot take that position. Mr. Ryan has been through three or four of these cases when I was still in his office in which the error was made, and Mr. Ryan is trying to force me into the position of appearing generally for the Consul. That is not the procedure outlined by the Supreme Court in the Muir case, 254 U. S., 522. It must be [fol. 19] through diplomatic channels, and I respectfully ask the Court to read this last paragraph on page 530.

Mr. Ryan is trying to force us into a position where we put a claim in for the vessel.

The Court: I understand what you contend, but what I want to know now is what reasonable ground is there within the limitations of our rules and the admiralty rules of the Supreme Court which would justify an adjournment.

Mr. Hagen: Simply by the affidavit of the Consul General of Spain, which I will present to you as soon as I am able to have it signed, in which he outlined the facts. And as a matter of courtesy to the Consul General of Spain, I am asking that for him.

Mr. Ryan: When do you expect to have that?

Mr. Hagen: I will get that this afternoon. Incidentally, I got this matter before me when Mr. Combs called.

Mr. Ryan: Will a copy of that be served upon us this afternoon?

Mr. Hagen: I will be very glad to do it.

Mr. Ryan: I am not going to take any technical advantage at all. I am confronted with a very serious and urgent situation, and I merely think that the examination of these witnesses should proceed, as this is a possessory libel. They have not filed any answer, and yet they are coming in here asking for an adjournment.

The Court: I am sympathetic with the efforts of Mr. Hagen to get the proper authorization.

Mr. Ryan: May I suggest this, he has not been retained yet by the Ambassador? These men are just appearing for the Consul, and it becomes just a case of the Consul. [fol. 20] And it is cases like this that have caused the Court just this kind of annoyance. They have come on for trial, and the Consuls have asked all kinds of things, introduced papers, and the like, and then they have assumed no responsibility. And the Supreme Court has said that that is not the thing which this Court should do.

The Court: I will take Mr. Hagen's statement.

Mr. Hagen: This is the Consul General of Spain, and unfortunately we have not been able to contact the Ambassador. This thing was served on Monday, I believe, late, I am not sure where it was, and it only came to my attention late last evening, at which time Mr. O'Connor's representative was to come over here and discuss the matter. He did, and we are seeking communication with the Ambassador. The Consul General is doing it; I am merely asking this as a courtesy.

Mr. Ryan has just stated that the Consul has no authority to appear generally, yet he is asking me to do it when he knows that I cannot do it.

The Court: He is not asking you to do anything, he isn't making any request of you at all. In fact, he is not interested in what you do at all. He wants to go ahead with this hearing, and he is entitled to go ahead.

Mr. Hagen: I can merely come here and present the facts to the Court, present an affidavit from the Consul General of Spain.

The Court: Have you that now?

Mr. Hagen: I have not got it now. I will have it, if you wish it, sometime this afternoon.

Mr. Ryan: Would you like to deny each of the allegations on the libel, and let me take the testimony of these men? [fol. 21] We may not have them available later.

Mr. Hagen: How can I do it? I cannot appear generally.

The Court: I am almost inclined to let Mr. Ryan go ahead and take the testimony of his witnesses this afternoon, and I will order them to return for cross examination, dependent upon your position in the matter, tomorrow.

Mr. Hagen: I would like it to appear that we do not take any part in the proceedings.

The Court: Yes.

Mr. Ryan: This is what we would like to do, take the testimony of these witnesses, and we would like the issues joined in some way. May we have them enter a general denial so the thing will be at issue?

The Court: I won't compel that. Apparently they are under an embarrassment which will prevent the entry of any such appearance.

Mr. Ryan: May I suggest this; The Consul can appear generally in any case, the Consul can appear generally. It is the Ambassador's appearance as a diplomatic representative which claims immunity. The Consul is entitled to no privileges, no immunities.

Now, counsel in this case says that he is going to get in touch with somebody claiming immunity. That is a very strange kind of situation to have handled in this way. I think they ought to put the thing at issue in some way so that when I take my testimony it will be testimony in the case.

The Court: They cannot be compelled to do that. You have the election of proceeding ex parte or consenting to an adjournment.

[fol. 22] Mr. Ryan: Will the Court rule that this testimony shall be received as testimony in this cause?

The Court: Ex parte.

Mr. Ryan: Yes, but——

The Court: There is no one to cross examine them, the issues are not joined.

Mr. Ryan: Under the feature that your Honor announced when your Honor said that you would order them back for cross examination?

The Court: I will do that; I will order them back for cross examination if anybody makes an appearance to entitle them to cross examination within the time I shall set.

Mr. Ryan: But what I am getting at is, will this be testimony in the case of the witnesses that we are going to hear now?

The Court: Any testimony that is taken is ex parte testimony, but testimony taken in the case. There is only one thing here, that is a cause.

Mr. Ryan: May I suggest that this testimony isn't ex parte, because this is a suit against the ship in rem, and that makes the ship the defendant.

The Court: There is nobody to cross examine, to that extent.

Mr. Ryan: Only to that extent, that is all right.

Mr. Hagen: I assume that later on, if we do appear here generally, that objections to the questions may then be made.

The Court: Yes.

Mr. Hagen: May I have it appear on the record that I appear specially? May I offer in evidence our notice of appearance?

[fol. 23] The Court: How can you offer it in evidence when you have no standing here at all?

Mr. Hagen: Then I will file my notice of appearance with the Clerk.

The Court: You will have to file it with the Clerk of the Court.

Manuel Martinez, called as a witness on behalf of the libellant, having been duly sworn, testified as follows through Manuel Noriega, who was duly sworn as interpreter:

The Court: Before these attorneys leave, you have appeared before me and asked for an adjournment. I want to know when they are ready to enter their appearance either specially or generally, or to appear and enter whatever pleadings they want to file.

Mr. Rosenberg: Just as soon as we get word from the Ambassador. We expect to get that within forty-eight hours.

The Court: At the conclusion of this testimony I will indicate an adjourned time.

Mr. Rosenberg: Yes.

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Captain of the Spanish Merchant Marine.

Q. How long have you been licensed as a captain in the Spanish Mercantile Marine?

A. Twenty-three years.

[fol. 24] Q. Have you ever been captain of the Spanish ship Navemar?

A. Yes, I am actually master too.

Q. When were you appointed master of the Navemar?
A. In May, 1934.
Q. Who appointed you as master or captain of the Navemar?
A. The Compania Espanola de Navegacion Maritima.
Q. Do you see in the court room any of the directors of that company?
A. Yes, sir.
Q. Who is it?
A. Mr. Marcelino Garcia.
Q. Where does Mr. Garcia have his office and place of business as such director of the company?
A. In New York, in Battery Place.
Q. Have you served continuously as master of the Navemar since 1934, when you were appointed?
A. Yes, sir.
Q. In October, 1936, where was the steamship Navemar?
A. At sea.
Q. On what date did she arrive at Buenos Aires from sea?
A. On the 9th of October.
Q. How long did she remain in Buenos Aires?
A. Eight days.
Q. During those eight days what, if anything, happened with respect to anyone else than the owner you have named claiming title to that ship?
A. I received a cablegram from Spain, from the Director of Navigation, informing me of the confiscation of the Navemar.
Q. Where is the original of that cablegram?
A. I have it on board.
Q. On board the Navemar?
A. Yes, sir.
Q. Where is the Navemar now?
A. She is anchored off Robins Dry Dock.
Q. In Brooklyn?
A. In Brooklyn.
[fol 25] Q. Have you a photostatic copy of that cablegram?
A. This one I have here.
Q. Do you recall whether or not that is a correct copy of the original?
A. Yes, identically the same.

Mr. Ryan: I offer it in evidence as Libellant's Exhibit 1.

The Court: Why isn't the original produced? I won't permit you to offer a photostatic copy unless the absence of the original is established.

Q. Can you go on board the Navemar and get us the original cablegram and bring it back here?

A. Naturally, if I go on board the ship.

Q. Will the people on board the Navemar let you go on board and come off again?

A. I do not believe so, because they have told me that I will be forbidden to go ashore.

The Court: Who are "they"?

Q. Who are "they"?

A. The committee from on board.

Q. What do you mean by "the committee"? Did you appoint them or the owner of the ship?

A. No, sir, they appointed themselves.

Mr. Ryan: I renew my offer of this photostatic copy of the cablegram in evidence.

The Court: Net yet. You can mark it for identification.

Mr. Ryan: Then I ask that it be marked for identification as Libellant's Exhibit 1.

(Marked Libellant's Exhibit 1 for identification.)

[fol. 26] Q. What are the names of those members of the committee whom you say have taken physical control of the ship?

A. The name of one is Manuel Freire, fourth engineer; Jose Arana, apprentice,——

Q. Who are the other members of the committee?

A. Rafael Crespo, second officer, and Antonio Sanchez, chief steward, and Gaspar Lopez, oiler.

Q. All right. After receiving that cablegram, Libellant's Exhibit 1 for identification, what did you do?

A. I went to the Spanish Consul and presented myself following the instructions of the Merchant Marine.

Q. At Buenos Aires, is that correct?

A. At Buenos Aires, yes, sir.

Q. Was it the Consul or the Consul General?

A. The Consul General.

Q. What did the Consul General tell you, if anything?

The Court: No, that is not admissible.

Q. Did you receive any orders from the Spanish Consul General?

A. He had no instructions from Spain, but he instructed me to follow the voyage, since he had no instructions.

The Court: I shall not receive that as hearsay evidence. You can ask him what he did after his talk with the Consul General.

Q. After your talk with the Spanish Consul General at Buenos Aires what did you do?

A. I proceeded to Rosario. I wrote a letter back to [fol. 27] Buenos Aires putting myself again at the disposal of the Spanish Consul General, and proceeded to Rosario, since he gave me no other instructions.

Q. What cargo did you load at Rosario?

A. I proceeded to load with 6,000 tons of linseed.

Q. Who were the consignees of that cargo?

A. The Linea Sud Americana was the charterer.

Q. So after loading that cargo at Rosario, did you deposit any papers with the Spanish Consul at Rosario?

A. The ship's roll.

Q. Is this a photostat of the ship's roll, or part of the ship's roll?

A. It is of the page corresponding to Buenos Aires and Rosario.

Q. Where is the original of that ship's roll?

A. With the Spanish Consul at New York, he has it.

Q. You deposited it there, did you?

A. Yes, naturally.

Mr. Ryan: I ask that this copy be marked for identification, marked Libellant's Exhibit 2 for identification.

(Marked Libellant's Exhibit 2 for identification.)

Q. On leaving Rosario and going to Buenos Aires did you take with you that ship's roll that the Spanish Consul at Rosario had?

A. No.

Q. Why not?

A. When we sailed from Rosario it was too late to clear by the Consul, we have to sail from Rosario on the advice of the Maritime Commission, because it is low tide on the river, and we could not sail at any other time, and if we missed

[fol. 28] that we would have to wait four or five days to get instructions from the Consul to sail.

Then when we wanted to sail, to clear the vessel, we did not have time to get orders from the Consul, so we cleared and went on to Buenos Aires, and on arrival at Buenos Aires the Consul at Buenos Aires requested from the Consul at Rosario to send the ship's roll down to the Consul at Buenos Aires.

Q. After loading this linseed at Rosario and sailing for Buenos Aires, leaving behind the ship's roll with the Spanish Consul at Rosario——

A. Yes.

Q. (Continuing.)—did you load additional cargo at Buenos Aires?

A. Yes, we took 2,000 tons more.

Q. Of what kind of cargo?

A. General cargo, grain, leather.

Q. Then did you report again to the Spanish Consul General at Buenos Aires after you returned there from Rosario?

A. Yes, sir.

Q. Did the Spanish Consul General at Buenos Aires do anything that you saw?

A. He cabled back asking for instructions, and I do not know whether he received any or not, but he instructed me to sail for New York.

The Court: The hearsay testimony isn't admissible.

Mr. Ryan: I didn't mean it that way.

Q. Did the Spanish Consul General at Buenos Aires make any notation on your ship's papers at any time?

A. On the ship's register.

Q. Who made that endorsement on this Libellant's Ex-
[fol. 29] hibit 2 for identification, the ship's roll?

A. It was by the Consul General at Rosario, he wrote it.

Q. Then the Consul at Rosario sent that original roll to the Spanish Consul General at Buenos Aires for delivery to you, is that it?

A. That is right.

Mr. Ryan: Mr. Interpreter, will you read into the record a correct English translation of that?

The Court: Just a moment, it is not in evidence, therefore the translation is not admissible. It was marked for identification.

Mr. Ryan: Yes; probably I should subpoena duces tecum this from the Spanish Consul. I thought it was on board the ship, but I understand it is with the Spanish Consul. We can get it there. But I will tell you, I do not think there will be any objection to this.

The Court: I cannot help it; I am trying this case with just as much technicality as though the other side was present.

Mr. Ryan: Then may I not read it in?

The Court: I won't permit you to read it in.

Q. Was the original ship's roll, that is, the original of Libellant's Exhibit 2 for identification, delivered to you by the Spanish Consul General at Buenos Aires with this endorsement on it that is indicated at the right of the roll?

A. Yes.

Q. What is this document?

A. The ship's register.

[fol. 30] Q. Of the Spanish steamship Navemar?

A. Yes.

Q. Is that the original?

A. Yes, that is the original.

Mr. Ryan: I will state on the record that that has been produced here, just before the captain testified to it, by the United States Collector of the Port at New York, upon whom aa subpœna duces tecum was served to bring it here for this hearing, by Thomas O'Hagan of the United States Collector of the Port's office in New York. Is that right?

Mr. O'Hagan: It is.

The Court: This is very irregular, you cannot talk across the room.

Mr. Ryan: I will call him right after this. I thought that we could do it this way, as he is anxious to go back. Are you in a hurry to go back?

Mr. O'Hagan: Yes, I would like to go back as soon as I can.

The Court: You can withdraw the witness and have him take the stand and testify.

Mr. Ryan: All right, I will withdraw the witness.

(Witness temporarily withdrawn.)

[fol. 31] THOMAS O'HAGAN, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. I am a clerk in the Marine Division of the Office of the Collector of Customs at New York.

Q. Do you appear here in response to this subpœna duly served on you?

A. Yes, sir.

Mr. Ryan: I ask that the original subpœna be marked Libellant's Exhibit 3 for identification.

(Marked Libellant's Exhibit 3 for identification.)

Q. This subpœna calls for you producing the ship's, original ship's register of the Spanish ship Navemar and all other documents deposited with you by her master when she was entered here by him on or about November 27th or 29th.

Will you please produce those documents?

A. I have here what purports to be the ship's, the original of the ship's register, and with it is a receipt for the tonnage tax paid to the United States.

Q. Are those the only two documents that you have produced in answer to that subpœna?

A. Those are the only two documents I have.

Q. Are those the only two documents that were filed in connection with entering the Navemar at this port on her voyage from Buenos Aires up here?

A. No, there is a ship's manifest containing a list of the cargo, and bills of health and other papers, which I did not [fol. 32] have time to get up, because of the urgency of this subpœna.

Q. Could you bring those later on so we could have them for the record, this afternoon?

The Court: We are going to adjourn at four o'clock.

Q. If you could get them over here——

Mr. Ryan: It will only take him ten minutes to go over there.

The Court: We will not sit later than four o'clock.

Q. If you could get them over here at the adjourned date, could you bring them over then?

A. We can bring them over whenever you want, but we would like you to be more specific. The papers on the entrance of a vessel are rather voluminous.

Q. What papers were filed in the Custom House upon the entry of this vessel?

A. There is a manifest filed, the master of the ship files a manifest of what is contained in the ship upon entering this port, he files bills of health, he files various other papers requesting permission for the discharge of cargo to be issued.

Mr. Ryan: I offer in evidence the original ship's register of the Spanish ship Navemar.

The Court: It will be received.

The Witness: Your Honor, may I have a word?

The Court: Yes.

[fol. 33] The Witness: I am under instructions not to part with this, because the Collector is charged with the custody of this document and the return of it to the master of the vessel upon clearance.

Q. Is this a complete photostatic copy of that document or not?

A. Yes, this is a true copy of the original which I have.

Q. You have compared it with the original, have you?

A. Yes, sir.

Mr. Ryan: I ask leave to substitute the photostatic copy for the original, and offer it in evidence.

The Court: That may be done.

(Marked Libellant's Exhibit 4 in evidence.)

Q. Now, may we have the other documents at the adjourned date?

A. If you will tell me what it is that you want, they are quite voluminous, the documents that we have.

The Court: What you had better do is go over there and look at them, and tell this witness what you want, and have him here at two o'clock on the 11th, that will be the adjourned date.

Mr. Ryan: All right. I ask that this witness be directed to report here at 2 p. m. on December 11th, which I understand is the adjourned date.

The Court: That is right.

(Witness excused.)

[fol. 34] MANUEL MARTINEZ, resumed the stand.

Direct examination.

By Mr. Ryan:

Q. Who made this endorsement at the bottom of this last page of this ship's register, Libellant's Exhibit 4?

A. The Spanish Consul General at Buenos Aires.

Q. When did he make that endorsement, if you know?

A. The day before we sailed from Buenos Aires.

Q. Do you, in the ordinary course, deposit that ship's register with the Consul General?

A. No, sir.

Q. Did the Consul General demand that you deposit the ship's register with him for the Navemar at Buenos Aires?

A. Yes, the Consul requested it.

Q. And then did you deposit it with him?

A. Yes, I took it over.

Q. And what did the Consul General do with it?

A. He kept it until the day that we were sailing, and on the day we sailed he redelivered it to me.

Q. When he redelivered it to you what was the difference in it from the time that you delivered it to him?

A. This note over here (indicating).

Q. On what date did the Spanish Consul General at Buenos Aires deliver you that ship's register with that endorsement on it?

A. On the 28th.

Q. Of what month?

A. In October.

Q. On October 28, 1936?

A. Yes, sir.

[fol. 35] Mr. Ryan: Now, Mr. Interpreter, may I ask that you read into the record a correct English translation of that endorsement?

The Interpreter: By cable dated the 15th of October of 1936 the Spanish Embassy at this capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazette on the date of the 11th of the present month.

It is dated Buenos Aires, the 28th of October, 1936, and it is signed by Amador Sanchez. Over the signature is "Consul in Charge of the General Consulate," and he has a stamp "Consul General of Spain," with the Spanish coat-of-arms.

Q. When the Spanish Consul General at Buenos Aires returned you your ship's register with that endorsement thereon, did he issue you any orders?

A. No, none, only to continue my voyage because there were no instructions from Spain.

Q. Did you receive any instructions from the owners of the steamship Navemar, the Compania Espanola de Navegacion Maritima in connection with that?

A. Nothing whatsoever.

Q. Were there any agents for the owners of the Navemar, Compania Espanola de Navegacion Maritima at Buenos Aires or Rosario?

A. No, the representatives of the Linea Sud Americana.

[fol. 36] Q. That was the charterers?

A. Yes, sir, the charterers.

Q. Then after receiving this from the Spanish Consul General at Buenos Aires and being told by him to continue your voyage, what did you do?

A. First I asked him why he put that note on, whether the owners know anything about it.

Q. What did the Spanish Consul General reply to that?

A. That he didn't know anything, he had no news at all about anything.

Q. Then what did you do?

A. Then we sailed for the voyage, since he gave no instructions except to continue the voyage.

Q. Voyage to where?

A. And the Consul told me to cable the Director of Navigation, as he would also do that. And I cabled the Director of Navigation that I was leaving Buenos Aires for New

York on the instructions of the Consul General at Buenos Aires.

Mr. Ryan: May I hear that answer?

(Last answer repeated by the reporter.)

Q. Where was the Director of Navigation?

A. The cables that I received from him were from Madrid, and I sent mine to Madrid.

Q. Did you say the Director of Navigation or Director General of Navigation?

A. Director General of the Spanish Merchant Marine.

Q. At Madrid?

A. At Madrid.

Q. Then, you came right to New York, did you, with the Navemar?

A. Yes, sir.

Q. On arrival at New York, what did you do?

A. Presented myself to the charterers of the boat and to the Spanish Consul at New York, the usual procedure when a boat reaches port.

[fol. 37] Q. By the charterers do you mean the same firm, Linea Sud Americana, or not?

A. Yes.

Q. They have an office where?

A. Battery Place.

Q. Did the charterers give you any instructions?

A. They instructed me that once I had unloaded I should again follow the instructions for loading.

Q. Were those instructions in writing?

A. Yes, in writing.

Q. Where is the original of those instructions?

A. This is the original. (Producing paper.)

Q. That is a duplicate original, isn't it?

A. That is what they handed to me.

Mr. Ryan: I offer this document in evidence as Libellant's Exhibit 5.

(Marked Libellant's Exhibit 5 in evidence.)

Q. After receiving these instructions, Libellant's Exhibit 5, from the charterer, whom did you see or what did you do?

A. I want to the Consul, I explained to him that the charterer of the boat requested that I put the boat into the pier to be loaded again, and since our instructions from him

placed the boat at his own disposal, not to comply with the request of the charterer would create a great loss, a great damage.

Q. Did you report to the owners of the Navemar, the Compania Espanola de Navegacion Maritima?

A. Yes.

Q. What did the owners of the Navemar, the Compania Espanola de Navegacion Maritima, do, if anything?

[fol. 38] The Court: No, the owners can come here and testify to that themselves.

Mr. Ryan: All right; but he is right here.

The Court: They can testify to that.

Q. After receiving those orders from the Spanish Consul at New York, what did you do?

A. Go and inform the charterers that I can go and load.

Q. Did you do that in writing?

A. Yes, naturally.

Q. What is that document?

A. This is the letter that I wrote to the charterers informing them of what is happening, that the boat was confiscated by the Spanish Government.

Q. Is that the original of that letter in your handwriting?

A. Yes, in my own handwriting, I wrote it.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 6.

(Marked Libellant's Exhibit 6 in evidence.)

Mr. Ryan: Mr. Interpreter, will you read into the record a correct English translation of that letter?

The Court: Has it been translated?

Mr. Ryan: It has been translated.

The Court: Then, mark the translation; it isn't necessary that he should read it.

Mr. Ryan: All right.

Q. Is this a correct translation of that letter?

A. If I may see it, please.

[fol. 39] Q. Yes. (Handing witness paper.)

A. Yes, it is.

Mr. Ryan: I offer the translation in evidence as Libellant's Exhibit 7.

The Court: That will be received.

(Marked Libellant's Exhibit 7 in evdience.)

Q. Did you receive any instructions in writing from the Spanish Consul General at New York?

A. Yes.

Q. Have you the original of those instructions?

A. Yes.

Q. Will you produce them?

A. Yes. (Producing paper.)

Mr. Ryan: I offer those written instructions in evidence as Libellant's Exhibit 8.

(Marked Libellant's Exhibit 8 in evidence.)

Q. Do you wish to keep personal possession of that original letter?

A. Yes, I would like to.

Mr. Ryan: In view of that, your Honor, I ask leave to substitute a photostatic copy.

Q. Is this a correct and complete photostatic copy of that original letter?

A. Yes; identical.

Mr. Ryan: I ask leave to substitute the photostatic copy so that the witness can keep the original.

The Court: That may be done.

(Photostatic copy marked Libellant's Exhibit 8 and substituted for original previously so marked.)

[fol. 40] Mr. Ryan; I ask the interpreter to read into the record a correct English translation of that letter.

The Court: Read it out loud, will you, so that I can hear you?

The Interpreter: I must inform you that as per instructions received——

Mr. Ryan: Read the whole thing, the date and everything.

The Interpreter: The letterhead is that of the Spanish Consul at New York, 515 Madison Avenue, New York. No. 2988. New York, November 28, 1936.

I must inform you that as per instructions received from His Excellency, the Ambassador of the Nation at Washington, the boat of your command is from this date at the disposal of the Government of the Republic. You must wait for new instructions from same in all that refers to future activities and present to me as soon as possible a detailed relation of the expenses of said boat, as, for instance,

salaries, food, and so forth, as well as a bill for the work and repairs of minor importance that you are actually doing.

Signed Luis Careaga, Consul General, and addressed to Mr. Manuel Martinez, master of the Spanish steamship Navemar, New York.

Q. Did you reply to that letter?

A. I did not answer it in writing, but in person by word of mouth.

[fol. 41] Q. Did you deliver any document in writing listing the salaries and other things that the Consul General had demanded of you?

A. Yes, I did.

Q. What is that document?

A. That is an accounting, an account of the Compania Espanola de Navegacion Maritima of the crew of the boat.

Q. Who prepared that document?

A. I did.

Q. To whom did you deliver that document?

A. To the Consul.

Q. At New York?

A. Yes.

Q. The Spanish Consul at New York?

A. Yes.

Q. After receiving that other letter that you just mentioned?

A. Yes, after receiving that letter.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 9.

The Court: Ask him whether that is the paper itself.

Q. Is that the paper that you delivered?

A. No, no, no, not that.

Q. Is this a correct copy of it?

A. Yes, yes.

The Court: That may be received only for identification.

The Witness: This is a copy from the original, it is addressed to the Spanish Consul.

Q. Was the document that you delivered to the Spanish Consul in New York in Spanish or in English?

A. In Spanish.

Q. And this is in English?

A. This is in English.

[fol. 42] Mr. Ryan: I ask that this be marked Libellant's Exhibit 9 for identification.

The Court: That is right.

(Marked Libellant's Exhibit 9 for identification.)

Q. While the Navemar was here in New York, after she had arrived here from Buenos Aires, were any repairs ordered for her?

A. Yes, I ordered her.

Q. Who was to do the repairs, who did you order?

A. Robins Dry Dock.

Q. When was that order given?

A. Upon arrival here, and then I communicated with the Spanish Consul, and the Spanish Consul told me to go ahead.

Q. Then, did the repairmen from Robins Dry Dock come aboard and make their repairs or not?

A. Yes, they went aboard, but the Committee on the boat told them that they could not make any repairs until they told them so.

Q. Where were you when the repair men came on board?

A. I was ashore.

Q. When did you come aboard after that?

A. In the afternoon.

Q. Of what day?

A. On the 3rd.

Q. Of what month?

A. Of this month, December.

Q. And was anything reported to you at that time?

A. Yes. When I was ashore I was called by the Robins Dry Dock, and they asked me, since I ordered the repair work done, their men had not been allowed on the boat, had been put ashore and not allowed to do the work.

[fol. 43] Then, I went on board the boat to inform myself what had happened, and the chief engineer and the first officer, who had taken charge of the men on the boat when I was ashore, told me that the Committee had not allowed them to do the work. Upon which I went to the Spanish Consul to find out why the Committee would not let them work, and somebody in the Spanish Consul's office, the gentleman in the Spanish Consul's office, said that they had done very well in not allowing them to do the work.

And then the Consul told me not to make any repairs, and everything was suspended.

Q. Then, what did you do?

A. Then, what could I do? The Consul tells me to do one thing, the Committee tells me another thing. What is there that I can do?

Q. Did you try to go back on board the Navemar, and if so, what happened?

A. Then, I came ashore to inform the authorities of what was happening, that they wouldn't pay any attention to me on the boat.

Q. To whom did you go? Was that to the Spanish Consul?

A. Yes, to the Consul, and the Consul was the one that had said not to do anything.

Q. Then what did you do?

A. Then I presented myself here to elevate a protest about what was happening on the boat.

Q. Did you try to go on board the Navemar?

A. Yes, I did.

Q. And what happened?

A. Yes, I went on board to attend to some business. And when I was trying to go ashore again I was informed that I couldn't go ashore from instructions from the Consul, that nobody could go ashore.

[fol. 44] Q. Who gave you that order, who was it that told you that?

A. The fourth engineer, who was a member of the Committee, the second officer and a sailor.

Q. The fourth engineer is Manuel Freire?

A. Yes.

Q. And who was the second officer?

A. Rafael Crespo.

Q. And who was the other one?

A. Jose Arana, apprentice.

Q. On what day was that?

A. Friday.

Q. On what date was it?

A. On the 4th.

Q. December 4th?

A. Yes.

Q. That is just last Friday, isn't it?

A. Yes, that is right.

Q. Where was the Navemar then?

A. It was anchored in front of the drydock, Robins Dry Dock.

Q. In Brooklyn?

A. Yes, in Brooklyn, in front of Robins Dry Dock.

Q. When these three men told you that you couldn't go ashore, you, the captain of the ship, what did you do?

A. I told them that in sight of the orders of the Committee and of the Consul, that I, as master of the steamer could go aboard and ashore whenever I wanted. And I asked them to show me any reason for them to order me otherwise.

Q. And did you go ashore?

A. Yes, naturally.

Q. Is that committee the same committee that you referred to before of Crespo, Arana, Freire, Lopez and Sanchez?

A. Yes, the same committee.

Q. What else did you do after that?

[fol. 45] A. I came ashore and elevated a protest before a Notary Public.

Q. Where is the original of that protest?

A. It must be in the Custom House.

Q. To whom was the protest addressed?

A. To the Collector of Customs, not to deliver the ship's register to another person that I knew was going to go on board.

Q. Is that paper a correct copy of the protest that you delivered to the Collector of the Port at New York?

A. Yes, it is.

Mr. Ryan: I offer it for identification as Libellant's Exhibit 10.

The Court: It may be marked for identification.

(Marked Libellant's Exhibit 10 for identification.)

Mr. Ryan: That is all.

(Witness excused.)

Mr. Ryan: I would like the record to show that this witness will be produced for cross-examination at any time that your Honor directs, and I understand that the adjournment is to be until 2 p. m. on December 11th.

The Court: That is right.

Mr. Ryan: At 2 p. m. on December 11th, then.

The Court: Yes.

[fol. 46] FEDIRICO GOMEZ, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?
A. Chief officer.
Q. Of what ship?
A. Of the Navemar.
Q. Where do you reside?
A. Bilbao.
Q. Spain?
A. Spain.
Q. You are a citizen of Spain?
A. Yes, sir.
Q. You are appearing here under subpœna today?
A. Yes.
Q. Who is the captain of the Navemar, the master?
A. Manuel Martinez.
Q. The man who just testified?
A. Yes, sir.
Q. On last Tuesday, December 1, 1936, was Captain Martinez ashore or on the boat?
A. When, in the morning or in the afternoon?
Q. In the afternoon.
A. In the afternoon he was on board the boat.
Q. Was he on board in the evening of that day?
A. Yes.
Q. What happened on the evening of that day, December 1, 1936, on board the Navemar?
A. On that evening the master came aboard and he called the three officers to prepare an account of the salaries of the crew to take it to the Consul in order to collect, because we had not collected any salaries for 143 days.

And while we were preparing that payroll one of the oilers, Gaspar Lopez, came with a notice that we present ourselves for an election of a committee.

Q. Was that notice in writing?
A. Yes, it was.
[fol. 47] Q. Or not?
A. A written notice.
Q. Where is the original of it?

A. I do not know.

Q. Did you ever have possession of it? Did Lopez give it to you or did he take it away after he showed it to you?

A. He gave it to me and then took it back.

Q. Will you state the substance of that notice or writing?

A. I cannot recall it all. The three points that were on that paper were these:

There was an anti-Fascist Committee to be formed.

Another point was that the purpose of this committee would be to collect back salaries up to December 2nd.

Another point was that the committee will attend to everything pertaining to the food and treatment of the boat, as the previous committee formed in Tarragona, Spain, during the strike.

Mr. Ryan: There is one question that I forgot to ask the captain. Could I just ask him from here?

The Court: You may withdraw this witness and put the captain back on.

Mr. Ryan: I will recall him later.

Q. When was the steamship Navemar last in Spain or in any possession of Spain?

A. The month of July.

Q. What year?

A. This year.

Q. She has been outside of Spanish waters and Spanish territorial limits ever since that, is that right?

A. Yes.

Q. Did Lopez say anything to you when he showed that [fol. 48] paper to you or not?

A. He only asked me to read what it said, to see whether we were in agreement.

Q. And what did you say to him?

A. Yes, and I will form the Committee.

Q. What did you do after you were shown that paper and after you told that to Lopez?

A. Then the second officer, third officer and myself went over. The rest of the crew was in session meeting to elect the representatives to the committee from the officers.

Q. Was the captain or the chief engineer of the ship notified or present at that meeting?

A. No, they were not.

Q. This session of the crew without the captain or the

chief engineer, you say, was held where on the Navemar, what room?

A. In the firemen's mess, in the firemen's quarters.

Q. And that meeting of the crew was held without the knowledge of the captain or the chief engineer, is that correct or not?

A. I believe neither of them was notified.

Q. Who, if anybody, was elected as a result of this session of the crew in the firemen's mess hall?

The Court: Ask him first whether he was present.

Q. Were you present at that session of the crew in the firemen's mess hall in the absence of the captain and the chief engineer?

A. Yes.

Q. What was done at that session?

A. A committee of five members was formed, one represented the deck officers——

Q. Who was that?

[fol. 49] A. The second officer; Rafael Crespo. Another one represented the engine room officers——

Q. Who was that?

A. Manuel Freire. Another one represented the firemen.

Q. Who was that?

A. Gaspar Lopez. Another represented the stewards' department, and another one——

Q. Who was that?

A. I do not recall.

Q. Was it Antonio Sanchez?

A. Antonio Sanchez. Another one represented the sailors, Jose Arana.

Q. The purpose of this committee, you say, was an Anti-Fascist Committee primarily, is that right?

A. Yes, and besides, to collect the money due.

Q. What were to be the powers of that committee? Were they to take over command of the ship?

A. No.

Q. Did they take over command of the ship?

A. At least I have been forbidden by them to go ashore.

Q. You have been forbidden by them to go ashore?

A. Yes.

Q. When did you try to go ashore?

A. When we came in port and anchored at Brooklyn, I asked permission of the captain to go ashore to see a doctor. I said I was sick, not feeling well. And I went to the doctor and he told me that I should return on Monday for further treatment.

Q. Was that yesterday, or a week ago yesterday?

A. The day before yesterday is Monday, that was the day that I was asked to return again, on Monday morning.

Q. That was the day before yesterday?

A. Yes. And I asked the fourth engineer, Manuel Freire, [fol. 50] for permission to go ashore, and he answered me that as far as he was concerned personally he would let myself and everybody else go ashore, but that he had instructions not to let anybody ashore.

Q. He was a member of the Committee, was he?

A. Yes, he was.

The Court: We will take an adjournment now until Friday, at 2 p. m. for all purposes.

(Adjourned to Friday, December 11, 1936, at 2 p. m.)

Brooklyn, N. Y., December 11, 1936.

Met pursuant to adjournment at 2:00 p. m.; present as before.

COLLOQUY

Mr. Rosenberg: Your Honor, since I was here last time the Spanish Ambassador has made representations to our State Department. I have here in court the Acting Consul General, Mr. Luis Careaga, who will be glad to talk to you privately in chambers and consult with you in chambers, but we are not ready to go on trial until something more definite happens. We have not received any word from the Secretary of State.

The Court: Mr. Rosenberg, I cannot delay this hearing, but I will carry on with the examination of the witnesses, if libellant so elects, and reserve the right to any claimant to cross examine the witnesses at a subsequent hearing.

[fol. 51] Mr. Hagen: I was served today with a paper which is entitled, Notice to Produce, and which describes me as proctor for respondents. Now, I cannot accept a notice to produce, but I have here in the court all the documents

which Mr. Jones and Mr. Ryan wish, and if the Court orders it, under subpoena duces tecum in open court, I will be glad to remain here with those documents, but I cannot appear under a notice to produce.

The Court: I suppose, Mr. Ryan wanting the documents, is not particular through what medium they are offered.

Mr. Hagen: I will be very glad to help all I can. I will stay here, but I do not want this as a matter of record.

The Court: Very good.

Mr. Ryan: What papers have you filed in the case, Mr. Hagen, Mr. Rosenberg?

Mr. Hagen: Why, I prepared and submitted to the Court a notice of special appearance which the clerk yesterday refused to accept, although I had understood that the Court had directed me to file it with the Clerk.

The Court: There is no answer filed by anybody?

Mr. Hagen: No, there has been no answer.

The Court: You may proceed, Mr. Ryan.

Mr. Ryan: If you will produce those documents, I will offer them in evidence right now, Mr. Hagen.

Mr. Hagen: What documents?

[fol. 52] The Court: He does it, of course, as a friend of the Court.

Mr. Ryan: Yes.

Mr. Hagen: I have in my possession the original ship's roll, as it is called, which resembles a log to me; I have also the voyage record of the Navemar and the rules and regulations pertaining to the crew which are part of the ship's record.

Mr. Ryan: I offer the first of those as Libellant's Exhibit 11.

Mr. Hagen: May I ask that the book be not physically marked as an exhibit? It is part of the Consul's property. It has been turned over to the Consul by the captain.

(Deemed marked Libellant's Exhibit 11 in evidence.)

Mr. Hagen: If the Court wishes. I have probably a translation of the page Mr. Ryan wishes, also the original Spanish typed.

Mr. Ryan: If the Court please, this is a document belonging to the ship. It is our document.

The Court: It will be in the custody of the Court temporarily, but it will not be marked.

Mr. Hagen: May I state for the record, sir, that this is the log of the ship, turned over by Captain Martinez to the Acting Consul General of Spain.

The Court: Yes.

Mr. Hagen: And it was in the physical possession of the Consul General.

[fol. 53] Mr. Ryan: Well, I dispute that statement. This is the ship's.

The Court: Gentlemen, I am not going to spend any time beyond what I have already indicated. Mr. Ryan, you can take it or leave it.

Mr. Ryan: This is not a ship's log. I want the record to show it.

Mr. Hagen: Ship's roll.

Mr. Ryan: Ship's roll.

The Court: You may use any terminology you want. That does not change the fact. Whatever the first document is, the document will be known as Libellant's Exhibit 11, but will not be marked.

Mr. Ryan: I offer the second of these as Libellant's Exhibit 12. This was described by Mr. Hagen as voyage record of the steamship Navemar.

(Deemed marked Libellant's Exhibit 12 in evidence.)

Mr. Ryan: I offer as Exhibit 13, Libellant's Exhibit, the document produced by the Consul General and offered by Mr. Hagen as—how was that described?

(Discussion between Mr. Ryan and Mr. Hagen out of hearing of the Court.)

The Court: Mr. Hagen does not compel you to offer those things.

Mr. Ryan: I do not know what this thing is. I just don't want——

The Court: Please let us make some progress.

Mr. Hagen: I have also here——

Mr. Ryan: I ask that this one be marked for identification as Libellant's Exhibit 13.

[fol. 54] The Court: It will not be marked physically. It is designated 13 for identification.

(Deemed marked Libellant's Exhibit 13 for identification.)

Mr. Hagen: I have here also a copy of a letter which is part of the ship's papers from the Acting Consul of Spain to the Collector of Customs, Port of New York, to the effect that Captain Thomas Martinez——

Mr. Ryan: I did not notice the production of this. I object to any evidence or offer of evidence unless an appearance is entered.

The Court: Mr. Hagen is not offering anything. He is producing these things at the Clerk's table. If you want to do anything with them, please elect.

Mr. Ryan: I did not notice the production of this thing. This is some self-serving statement.

The Court: Let us go on with the evidence.

Mr. Hagen: Shall I——

The Court: No, you have no status here beyond what you voluntarily produce.

Mr. Ryan: I will call Mr. O'Hagan.

The Court: Have you finished with Gomez?

Mr. Ryan: No, I have not. I was going to say the Collector is here again with his documents and I thought I might call him out of order.

The Court: That will be all right.

[fol. 55] THOMAS O'HAGAN, resumed the stand.

Direct examination.

By Mr. Ryan:

Q. Have you now with you the other documents that were named in the subpœna duces tecum that was served on you day before yesterday?

A. I have.

Q. Will you produce them and describe each one as you produce it?

A. I have the inward foreign manifest of the vessel which was filed with the Collector of Customs upon entrance to New York on November 30, 1936. It was filed by the master of the vessel, M. Martinez.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 14, and ask leave to substitute a photostatic copy, which we will have made, for the original.

(Deemed marked Libellant's Exhibit 14 in evidence.)

A. (Continuing.) Attached to this manifest are various papers. The first attached is the master's oath on entrance, certifying to the correctness of his manifest. The second is a discharge from Quarantine.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 15 and ask leave to substitute a photostatic copy.

The Court: It will be so received.

(Deemed marked Libellant's Exhibit 15 in evidence.)

[fol. 56] A. (Continuing.) The third paper in the folio is the oath of the master, Manuel Martinez, taken before our boarding officer, designated, Master's Oath on Preliminary Entry of Vessel from Foreign Port.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 16 and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 16 in evidence.)

A. (Continuing.) There is also what appears to be a bill of health, it is in Spanish, and apparently is a bill of health issued by the local authorities at Rosario, the Argentine.

Mr. Ryan: I offer that as Libellant's Exhibit 17 and ask leave to substitute a photostatic copy.

The Court: That will be so received.

(Deemed marked Libellant's Exhibit 17 in evidence.)

A. (Continuing.) The next is a bill of health, American Consular bill of health, issued to the vessel at Buenos Aires.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 18 and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 18 in evidence.)

[fol. 57] A. (Continuing.) And follows an American bill of health issued by the Chief Quarantine Officer at the Port of St. Thomas, Virgin Islands.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 19, and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 19 in evidence.)

A. (Continuing.) And then follows a sheet which constitutes an outward foreign manifest from the Port of St. Thomas, Virgin Islands.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 20, and ask leave to substitute a photostatic copy.

A. (Continuing.) And this is merely a form and indicates that no cargo was laden at St. Thomas.

The Court: So received.

(Deemed marked Libellant's Exhibit 20 in evidence.)

A. (Continuing.) And then follows the clearance certificate of the vessel signed by the Deputy Collector of Customs at St. Thomas.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 21, and ask leave to substitute a photostatic copy.

The Court: So received.

[fol. 58] (Deemed marked Libellant's Exhibit 21 in evidence.)

A. (Continuing.) Then follows the store list of the vessel.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 20 and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 22 in evidence.)

A. (Continuing.) Then follows the manifest proper which consists of three sheets setting forth the lading of the vessel.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 23, and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 23 in evidence.)

A. (Continuing.) In addition I have copies of several permits issued to the vessel by the Collector of Customs at New York. These are copies. The original of these permits are out on the piers. They are in use by the discharge inspector or other officials.

Q. Those copies are part of the office records of the United States Collector of the Port of New York?

A. That is correct. The first permit is what is known as a preliminary permit, which, when issued, permits the ves- [fol. 59] sel to break bulk prior to the formal entry of the vessel at the Customs House.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 24, and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 24 in evidence.)

A. (Continuing.) I have also a permit known as General Application for Permit to Lade or Unlade that is issued for the purpose of having laundry removed from the vessel for cleaning or to have chronometers adjusted, and that sort of thing.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 25, and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 25 in evidence.)

A. (Continuing.) And finally I have a copy of application and permit to allow only permitted cargo to remain on the wharf.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 26, and ask leave to substitute a photostatic copy.

The Court: So received.

(Deemed marked Libellant's Exhibit 26 in evidence.)

Q. According to the records in the United States Customs House at New York, who are the agents for the Spanish [fol. 60] Steamship Navemar in New York at the present time?

A. Garcia & Diaz.

Q. What are the names of the persons, if any, who gave the bond to you, to the Collector of the Port at New York in connection with the discharge of the cargo?

A. This transaction is based on the term bond in the sum of $50,000 filed with us by Garcia & Diaz.

Q. According to the records of the United States Collector of the Port at New York, who is the master at the present time of the Spanish Steamship Navemar?

A. I don't think I can answer that because—I can merely limit my answer to the name of the person who was master when we had the last transaction with the vessel.

Q. What date was that?

A. That was the date of the entrance of the vessel on November 30, 1936, and it was entered by Mr. Martinez.

Q. And that is the last record you have of any master on the Spanish Steamship Navemar, isn't it?

A. That is correct.

(Witness excused.)

FEDIRICO GOMEZ, resumed the stand.

Direct examination.

By Mr. Ryan:

The Court: This interpreter has not been sworn. Have you been sworn?

The Interpreter: I have not, sir,

(Frederick F. Numan sworn as interpreter.)

(The witness testified through the interpreter.)

[fol. 61] Q. Has the respondent, Rafael Crespo, a license to act as a master of a vessel like the Navemar?

A. No.

Q. You know that of your own knowledge?

A. Yes.

The Court: Which respondent is that?

Mr. Ryan: Second officer of the ship, who is a member of this committee.

Q. How long have you been employed on the Navemar with Rafael Crespo?

A. About a year and a half.

Q. And you have been serving as chief officer of that steamer throughout nat period?

A. No, sir.

Q. How long have you been chief officer?

A. Five months.

Q. What were you before then?

A. Third mate.

Q. Third officer? When was the subpœna served on you that brought you into court on this examination?

A. On the 7th of this month.

Q. When were you last on board the steamship Navemar?

A. On Wednesday, when I left for the Court.

Q. That is day before yesterday?

A. Yes, day before yesterday.

Q. Was there anybody on board the Navemar when you left her day before yesterday other than the members of the crew of the Navemar excepting the master?

A. I don't know. No, there was none.

Q. Is there anyone on board the Spanish steamship Navemar who is not on the shipping articles of the Navemar for [fol. 62] the voyage which has not yet ended and which was entered into,—and which articles were entered into with the Compania Espanola de Navegacion?

A. No, there is none.

Q. When were the last shipping articles signed by the officers and crew of the Navemar, or contract with her owner?

A. Each member of the crew or officers signs the articles at the time of boarding the vessel, with the understanding there is a renewal from trip to trip, that are binding on the officers and members of the crew as long as the members of the crew continue in the employ.

Q. For what voyage are the members of the crew who are on board the Navemar right now signed, according to the shipping articles?

A. For the trip to Buenos Aires, Argentine.

Mr. Ryan: I ask Mr. Hagen and Mr. Rosenberg if they would be kind enough to produce the shipping articles or contract between the owner of this ship and the crew for this voyage.

Mr. Hagen: I have no such document. I have never seen any.

Mr. Rosenberg: I have none either.

Mr. Ryan: Have you been on board the ship, either one of you?

The Court: No, please; if you want to call them as witnesses, you may.

Mr. Ryan: All right, your Honor; I just thought we would save a little trouble here.

Q. Did the steamship Navemar sign on officers and crew at Barcelona for a voyage last May or not?

[fol. 63] A. No, sir, not in May. The signing of the articles is for continuing voyages and may be extended from voyage to voyage.

Q. Are the members of the crew of the Navemar who are on board her now under contract with her owner, the Compania Espanola de Navegacion Maritima, to carry on, on some other voyage, on some further voyage?

A. Yes, sir.

Q. A voyage to where?

A. The voyage as contemplated was to leave from Spain to New York, down to South America and back to Spain. The trip as made was to New York and down to South America, back to New York, which I consider to be half of the voyage. If the voyage had been completed, we would have gone to Barcelona, where the contracts would have been rescinded, but, as I have stated before,——

Q. Discharged, you mean, instead of rescinded?

A. Yes, but as I have said before, as long as the master and the members of the crew are willing to continue the contract, the same is extensible without the need of signing any further articles.

Q. Have any of the members of the crew of the Navemar who are now on board her and who are the only persons on board her been discharged from the shipping articles under which they signed with the owner, the Compania Espanola de Navegacion Maritima?

A. Not to my knowledge.

Q. Is there any officer or representative of the Spanish Government on board the steamship Navemar?

A. Up to the time of my leaving, no.

Q. Had there ever been any officer or representative of the Spanish Government in charge or possession of the Navemar?

[fol. 64] A. One, Mr. Diaz, came about last Wednesday to the boat. I was introduced to him by the committee as a representative of the Government. I had just a few words with him. The substance of our conversation being that some supplies were going to be brought on board, and thereafter I have seen him two or three times around the vessel.

Q. Did he leave the vessel shortly after he came aboard that first time?

A. Yes, he left soon thereafter.

Q. How long was he on board the second time he came on the vessel, about?

A. As many times as he has been there, he has been there for a short time.

Q. What do you mean by a short time, a few minutes?

A. Half an hour, an hour.

The Court: I suggest, Mr. Ryan, that he ought not to be questioned by means of leading questions. If this record is to stand in the event of an appearance on the part of a claimant, it would be much more effective if it appears that the questions are in correct form, subject to no objection.

Mr. Ryan: I will try to be careful. It is a little difficult.

The Court: You can ask him——

Q. Is there any member——

The Court: Just a moment. You can ask him whether Garcia—was it?

The Interpreter: Garcia.

[fol. 65] The Court: Whether Garcia produced any credentials.

Mr. Ryan: Diaz, wasn't it?

The Interpreter: Yes.

Q. Did Mr. Diaz produce any credentials?

A. I don't know. Not to me, as far as I am concerned.

Q. Weren't you the senior deck officer?

The Court: Well, he is. Do not argue with the witness now.

Mr. Ryan: Yes.

Q. Is any person on board the Navemar who is in the service of the Spanish Government?

The Court: So far as you know.

A. No.

Q. Is anybody on board the Spanish Steamship Navemar who is in the military or naval service of the Spanish Government?

The Court: If you know.

Q. If you know.

A. No, sir, not an officer of the Navy.

Q. Is the Spanish steamship Navemar engaged in any service for the Spanish Government, if you know?

A. No, sir. As far as I know, I and other members of the crew have always been working for the Compania Espanola de Navegacion.

Q. Has the Spanish steamship Navemar ever, so far as you know, been in the service of the Spanish Government [fol. 66] or performed any service for the Spanish Government?

A. Up to this date, no.

Q. In what service is the steamship Navemar engaged?

A. General transportation of cargo.

Q. For what company or for what person?

A. When you ask me for whom, I say for both shippers and consignees, but more precisely I will say that all of them do their business with the Compania Espanola de Navegacion Maritima.

Q. Has she always been engaged as a common carrier for hire, if you know? By common carrier I mean carrying goods for more than one shipper.

The Interpreter: I took the liberty to explain it.

A. Yes, as far as I know, the vessel has been engaged in cargo transportation, whether chartered or otherwise, according to the wishes of the owner.

Q. How many persons are on board the Spanish steamship Navemar, if you know?

A. I don't remember the number of men in the crew.

Q. Well, about how many, your best estimate?

A. 33, 34, 32. I don't know exactly.

Q. Is anybody who is on the crew list or shipping articles of the Spanish steamship Navemar, including the master, officers or crew, in the service of the Spanish Government?

A. Do you mean under the military services of Spain or an employee of the Spanish Government?

Q. Any kind of service for the Spanish Government right on the ship.

[fol. 67] The Interpreter: Apparently the witness has misunderstood.

A. There are on board men——

Mr. Ryan: Interpret it to him correctly, so he understands the question.

The Interpreter: I did, sir. His answer is:

A. There are on board men who did not get through with their military service and consequently can be termed under arms. There are some of them that got through with the military service and they received their discharge, and there are some of them yet to make their military service and necessarily should be considered under arms.

Q. Is anyone on board, on the crew list or on board, who is in the armed service of the Spanish Government?

Mr. Ryan: Mr. Interpreter, I do not know whether you got that. I am asking him whether they are now in the service, serving, not whether they have been.

A. I will refer to what I said before, I cannot answer that question, because you are subject to call until you are sixty years old, and right along you are under arms.

Q. But none of them, so far as you know, has been called back to service, is that right?

A. No; the only man on board who is under call to arms is one who has to go and do his military duty starting as of [fol. 68] January 1st; and I happen to know that because he is my cousin.

Q. That is, there is only one man on board,—and that is next January 1st, isn't it?

A. Yes, sir.

Q. From whom are any wages due that are due to any of the officers or crew of the Navemar?

A. Compania Espanola de Navegacion Maritima.

Mr. Ryan: That is all.

(Witness excused.)

Mr. Hagen: If your Honor please, I should like to do anything I can, but I would like to get back to my office, if possible.

The Court: You are under no restraint of the Court, Mr. Hagen.

Mr. Hagen: No; will counsel permit me to take back these official documents? I will always have them available. I will keep them in my own safe until——

Mr. Ryan: I would much prefer you leaving them in the custody of the Clerk of the Court. After all, title to them,

as we see it, is in ourselves. I don't want to be technical about it.

Mr. Hagen: Title is in the Spanish Consul.

Mr. Ryan: I move to strike out that last statement from the record by Mr. Hagen.

The Court: Motion denied.

[fol. 69] Mr. Hagen: The Consul tells me that this is the book of title of the ship, and he does not like to part with it. If it is possible to have copies made, I will be glad to have it done—that is, photostatic copies made.

The Court: Well, they are here and they are in the custody of the Court, and if you want to substitute copies, you may do so. You may take photostatic copies of such parts of the record that you want, but for the time being I think propriety calls for their retention by the Court.

Mr. Hagen: Be very glad to do it.

Mr. Ryan: I would like to recall the captain for just a couple of questions.

MANUEL MARTINEZ, recalled, testified as follows through the interpreter:

Direct examination.

By Mr. Ryan:

Q. When was the Spanish Steamship Navemar last within Spain or within Spanish territory, or any of the Spanish possessions or waters?

A. On the 26th of July, that was the last day.

Q. And that is the date the ship sailed from—what port?

A. From the Port of Bonoza, bound for Lisbon.

Q. Where did she sail from Lisbon, to what port?

A. Bound for New York.

Q. Where did she sail from, on leaving New York?

[fol. 70] A. St. Thomas, Rio de Janeiro, Montevideo, Buenos Aires, Rosario, and Buenos Aires again, St. Thomas and New York.

Q. What was the date of that sailing from New York?

A. On the 11th of September.

Q. What year?

A. 1936.

Q. What cargo did she carry on that voyage?

A. General cargo.

Q. For private persons or for a government?

A. For private parties.

Q. For how long has the steamship, Spanish steamship Navemar, been engaged in purely commercial service for hire, so far as you know?

A. Since the year 1921, when she was built, she has been engaged in commercial traffic.

Q. On leaving Spain for the last time, last May, what shipping articles or contract was entered into with the officers and crew on board the Navemar by her owner?

A. A regular labor contract, stating salaries and maintenance.

The Court: Where are those shipping articles? Ask him that.

Q. Where are those shipping articles?

A. We know everything about the contract, we know about the salaries we are to draw.

The Court: That is not my question. I want to know where the shipping articles are. I consider that a simple question, which does not call for a long answer.

The Witness: I have it on board.

Q. On board what ship?

A. On board of the Navemar.

[fol. 71] The Court: In whose custody are they?

The Witness: In the custody of the chief officer upon whom I have delegated this custody, when I left the ship.

Q. That is Fedirico Gomez?

A. But it is in my cabin.

Mr. Ryan: I will try to get that.

The Court: Yes, that is your duty.

Mr. Ryan: I did not know where it was or who had custody.

The Court: I found out. I do not know why you could not have found out.

Mr. Ryan: We cannot get on the ship.

The Court: You certainly can. The Marshal can go there, or the guard, if it is necessary, to protect whoever wants to go on board to get these papers.

Mr. Ryan: I move that the Court direct the Marshal, who is in court, to get the shipping articles from the captain's cabin on board the steamship, Spanish Steamship Navemar.

The Court: No, I won't tell him to do that, but I will tell him to serve whoever is there for their production.

Q. Now, those shipping articles call for what voyage for the crew and officers of the Navemar?

The Court: I think further examination as to the terms and conditions and contents of the shipping articles should be suspended until you make an effort to produce the instrument itself.

Mr. Ryan: All right.

[fol. 72] Q. Has there been an amendment on those shipping articles? If so, will you produce it? Do you have it? (Handing paper to witness.)

A. Up to now, this is what we abide by on board.

Mr. Ryan: Referring to the document he produced.

I offer that document in evidence as Libellant's Exhibit —just a minute, before I offer it in evidence.

Q. Is that a contract between the crew of the Navemar and her owner, Compania Espanola de Navegacion Maritima, if you know?

A. Yes, to undertake the voyage to the Argentine.

Mr. Ryan: I offer that document as Libellant's Exhibit 27.

(Marked Libellant's Exhibit 27 in evidence.)

(Witness excused.)

Mr. Ryan: The Coast Guard people are here.

CHESTER HARDY JONES, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Commander, U. S. Coast Guard.

[fol. 73] Q. Where are you stationed?

A. Aide to the Captain of the Port, Barge Office, New York.

Q. How long have you been such aide?

A. Why, about a year and a half.

Q. What have you had to do with the Spanish Steamship Navemar since she entered the Port of New York on her last voyage from Buenos Aires?

A. At some time last Friday, a week ago today, I was asked to detail a vessel to take the U. S. Marshal on board, U. S. Deputy Marshal.

Q. What reason was given you for taking him on board, if any?

A. To enter some kind of libel and post notice of the same.

Q. Did you receive any report in connection with that in the ordinary course of your work?

A. That the transportation had been furnished and that whatever was to be accomplished had been accomplished.

Q. Had the Marshal had any trouble serving that process before you made that detail, so far as you know?

The Court: I don't want any hearsay testimony.

Mr. Ryan: All right, sir. This witness can testify to what he saw and did and nothing more.

Q. What did you next have to do with the Spanish Steamship Navemar?

A. Transportation was furnished for the Marshal on one or two later occasions.

Q. What was reported to you by the Marshal in connection with the next occasion on which the Coast Guard went out?

[fol. 74] The Court: That is pure hearsay. The Marshal could testify as to what was done.

Q. Who was the person in charge of the guard that you sent with the Deputy Marshal on the first occasion on which he went on board the Navemar?

A. There was no special guard detailed. The officer in charge of the boat, which was the tug Tuckahoe, was boatswain Leek, who is present.

Q. How many men went with him on the first occasion?

A. The regular crew of his men.

Q. How many?

A. Around twelve.

Q. On the next occasion who was in charge of the Coast Guard men who went on board the steamship Navemar?

A. On that occasion a harbor launch, the Patrol, was used. Her crew being much less than the crew of the tug, three additional men were placed abroad the Patrol for that occasion for whatever use might come up.

Q. On the next occasion on which the Coast Guard took the Marshal out to the Spanish Steamship Navemar, how many did you assign to the detail as a guard?

A. Three additional persons to the Patrol.

Q. Why were the additional persons assigned?

A. I was told that there might be difficulty. Therefore I placed additional men available.

Q. Had it been reported to you that there had already been difficulty?

The Court: That is objectionable. I cannot make it too clear, Mr. Ryan——

Mr. Ryan: Yes, sir.

The Court (Continuing). —I will not permit questions of that kind.

[fol. 75] Q. Who was in charge of the Coast Guard unit that went on that occasion to the Spanish Steamship Navemar?

A. Chief boatswain's mate Chimpky.

Q. How many men of the Coast Guard went with him?

A. Three.

Q. Is that all there were?

A. Three additional to the crew of the Patrol, which crew is about six.

Q. Are you sure there weren't fifteen in that crowd of guardsmen that went out to the Spanish Steamship Navemar?

A. I would be very positive, unless there were some on board I knew nothing about.

Q. You think there were on board how many?

A. Not over nine.

Q. Were they armed or not?

A. Arms were available.

Q. Were they armed or not?

A. As to whether the arms were strapped on, I don't know.

Q. Did you or did you not give orders that side arms be supplied to the guard that went on that occasion?

A. I gave orders that side arms should be available.

Q. There was still another occasion on which the Coast Guard went out to assist the Marshal in connection with the Spanish Steamship Navemar, wasn't there?

A. There was still another occasion in which transportation was furnished for certain persons from the Navemar.

Q. How many were assigned by you from the Coast Guard to assist the Marshal on that occasion?

A. The regular crew of the tug were present only.

Q. And that is about how many?

A. Eleven or twelve.

[fol. 76] Q. About ten or twelve?

A. Yes.

Q. Who was in charge of the Coast Guard unit on that occasion?

A. I would have to check up; I believe the tug Hudson; the officer in charge being Christiansen.

Q. What is his rank?

A. Boatswain.

Mr. Ryan: All right, that is all.

(Witness excused.)

RALPH H. LEEK, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Warrant officer, United States Coast Guard.

Q. With the rank of boatswain?

A. With the rank of boatswain.

Q. How long have you been such?

A. Twelve years.

Q. Have you gone out on board the steamship, Spanish Steamship Navemar, since her arrival to New York from Buenos Aires?

A. I have.

Q. Will you tell us exactly what happened?

A. I was ordered by the Aide to the Commander of the Port to transport the United States Marshal, Deputy Marshal, and his assistants, to the Spanish Steamship Navemar and assist them if they desired assistance in serving a libel

on the vessel. I put the Marshals, Deputy Marshal, on [fol. 77] board. In a few minutes they called down and asked if I would come up with some men; they were not being permitted to libel the vessel. I went on board myself with two men. I inquired for the master. They said he wasn't there. A man who claimed he was second officer stepped forward. I informed him I was a United States Coast Guard officer, and the gentlemen with me were United States Marshals, and commanded that he permit us to go to the pilot-house and post the libel notice, which he did.

Q. Do you know the name of that second officer you refer to?

A. I don't.

Q. Did you hear it?

A. I heard it, but I wouldn't remember it.

Q. Was it Rafael Crespo?

A. I don't remember. The Marshal, the Deputy Marshal, wrote it down; I did not.

Q. Were you armed?

A. I was.

Q. Were the men who went with you from the Coast Guard armed?

A. They were.

Q. And you went on board at the request of the Marshal?

A. At the request of the Marshal.

Q. That is the United States Marshal for this Court?

A. Deputy United States Marshal for this District.

Mr. Ryan: That is all.

(Witness excused.)

[fol. 78] HENRY THOMAS CHIMPKY, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Chief boatswain's mate, U. S. Coast Guard.

Q. How long have you been such?

A. Thirteen years, sir.

Q. Have you had anything to do with the Spanish steamship Navemar since her arrival from Buenos Aires at New York?

A. Only to transport the Marshals.

Q. Tell us exactly what you had to do with her and what happened.

A. I was requested by Commander Jones to take these Marshals down there and put them on board the boat. I took them down there and placed them aboard the boat. In about twenty minutes they came back off, and I transported them back to the Barge Office.

Q. How many men did you take with you?

A. There were three extra men besides the crew.

Q. Were they on?

A. Those three were, yes, sir.

Q. Did you ask who was in charge of the ship when you went on deck?

A. I never went on the deck.

Q. Do you know who was in charge of the Navemar?

A. No, sir.

Q. What was the date that you went up?

A. That was December 7th.

Q. This year?

A. 1936.

Mr. Ryan: That is all.

(Witness excused.)

[fol. 79] Floyd Oliver Reams, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Chief boatswain's mate, United States Coast Guard, sir.

Q. How long have you been such?

A. Fourteen years.

Q. Have you had anything to do with the Spanish Steamship Navemar since her arrival at New York from Buenos Aires?

A. Only to accompany the Marshal on the 7th.

Q. On December 7th?

A. That is right.

Q. This month?

A. Yes, sir.

Q. Tell us exactly what happened.

A. We boarded the Navemar about 12:30 p. m., myself and another man preceding the Marshal up the gangway. There was no trouble that I could see on going aboard. There was another man besides myself and the man that preceded me. The other two men went up to the captain with the Marshal, I imagine the captain of the ship. I remained at the gangway. There was no trouble at all during the time I was on board. I was aboard about twenty minutes.

Q. Were you armed?

A. Yes, sir.

Q. Were the men with you armed?

A. Yes, sir.

Q. Did you ascertain who was in command of the Navemar, if anybody?

A. No, sir.

Q. Do you know who was in command of the Navemar?

The Court: He did not ascertain. That ends all that.

[fol. 80] Q. Who was on the deck when you got on the Navemar?

A. Well, there was a few Spaniards that I could see, and a watchman from the Merchant Police, at least, he had a badge saying Merchant Police, Marine Police, something like that.

Q. Did anybody seem to be in charge of the Navemar?

A. Not that I know of. There was a bunch of men running around there. I couldn't tell anything about it.

(Witness excused.)

THOMAS A. HANLEY, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Deputy United States Marshal, Eastern District of New York.

Q. How long have you been such?

A. Two years.

Q. Have you been on board the Spanish Steamship Navemar since her arrival at New York from Buenos Aires on her last voyage?

A. I have.

Q. Tell us exactly what happened the first time you went on board her.

A. With the assistance of the transportation furnished by the Coast Guard, I boarded the Navemar out at Red Hook Flats on the evening of November 4th——

[fol. 81] The Court: December?

The Witness: December 4th, rather.

A. (Continuing.) The time was about 6 p. m. I boarded the boat, the vessel, rather. I asked for the officer in charge, identified myself as Deputy United States Marshal. I was accompanied by Deputy United States Marshal Reese. Both of us asked for the officer in charge of the boat. The assemblage—there was an assemblage there of around six to ten of the crew, I imagine, or some members of the boat—and they—I could not understand what they were driving at or what they were saying, and they could not seem to understand me. So they procured some man from the ship's company to act as interpreter.

I explained to him my mission, I told him I wanted to attach the boat under a libel proceeding and I wanted to speak to the officer in charge.

Then they asked me what I wanted to do. I told them I would like to go to attach the papers at some convenient place on the boat where it could be noticed.

I was on my way to the wheel-house to attach the notice when one of the members of the ship's company told me he did

not understand what it was all about; I was to proceed no further.

I thought it was useless, I assumed at that time, due to the fact that they could not understand very well what I was saying or wanted to do, I assumed it would be useless to argue with them at all. So I asked below deck for the Commander of the Coast Guard to come up as a matter of precaution and to explain my mission. The Commander [fol. 82] thereupon climbed on board said vessel and explained to the men to show me who was in charge of the boat, as he wanted me to be given egress to the pilot-house or the wheel-house.

Thereupon they acquiesced and I went upstairs to the wheel-house, attached the boat, and read the paper to those in charge. Amongst them was one of the officers, who identified himself as an officer of the boat.

Q. When you said you wanted to speak to the officer in charge of the Navemar, what reply did you get?

A. They didn't seem—I asked for the captain in charge of the boat. They told me they did not know where the captain was.

Q. Then when you asked for the officer in charge of the boat, what reply did you get?

A. It seemed this man said to speak to him, he would take charge of the boat. He would not identify himself.

Q. Do you know that man's name?

A. I don't. He refused to give his name.

Q. Is he in the court room?

A. No, I don't see him.

Q. Why did you go to the Commander of the Coast Guard and ask for an armed guard?

The Court: That is not a proper question.

Q. Did you go to the Commander of the Coast Guard in connection with the Navemar?

A. I was directed by the Chief Deputy Marshal to report to the Customs House and go aboard the boat furnished by the Coast Guard for transportation.

Q. What did you report to the Commander of the Coast [fol. 83] Guard?

A. At the time I boarded the boat?

Q. At any time. Just take the first time first.

A. I reported to him that I served the libel papers and thanked him for his courtesy.

Q. What did you report the next time to the Commander of the Coast Guard?

A. I thanked him for his courtesy.

Q. The second time you went up?

A. The second time I went up I reported the same thing and thanked him for his courtesy and reported all was well.

Q. What did you report the third time you went up?

A. I wasn't on board the third time.

Q. Did you on one occasion ask for an extra guard or an extra detail, armed guard?

A. No, I did not ask for an extra detail at any time.

Q. What was done about an extra detail in your presence by the Commander of the Coast Guard?

A. That I don't know. I had nothing to do with the Coast Guard except I told him I wanted to use all precautionary measures.

Q. Didn't you report to the Commander of the Coast Guard that you had had trouble serving the libel on board the Navemar and you wanted an armed guard?

A. I didn't say anything about an armed guard. I told him I wanted to use precautionary measures.

Q. What precautionary measures did you and he devise?

A. I didn't devise any at all.

Q. What was done about it?

A. That I don't know. That I left to the Commander of the Coast Guard.

Q. You know that an extra armed guard went with you to the ship?

A. I don't know whether they were members of the crew or extra armed guard.

[fol. 84] Q. They were members of the Coast Guard, weren't they?

A. I imagine they were.

Q. And you asked for an extra detail, didn't you?

A. I did not.

Q. You reported that you had had difficulty on the ship?

A. I did not.

The Court: He said he did not. You cannot argue with your own witness.

Q. Did you hear any members of the crew of the Navemar, those who are on board her now, threaten, make any threats with reference to the captain of the Navemar?

A. I didn't hear anything as far as any threats were concerned.

Q. Did you hear any statements by members of the crew with reference to Captain Martinez of the Navemar?

A. No, sir, I did not hear any statements at all from any members of the crew regarding any officer of the Navemar.

Q. You said that the crew found a man who acted as interpreter. Now, what did this man say to you?

A. He said nothing. He asked me my mission and I requested him to give me access to the wheel-house; I wanted to see an officer of the boat.

Q. What did he say about the captain, Captain Martinez of the Navemar?

A. I understood through broken English from one of the men on board the boat that the captain was not on board.

Q. What did he say they would do if he tried to come on board, what they would do?

A. No conversation did I hear any reference to that at all.

Q. What other Deputy Marshal was with you?

A. Deputy Marshal Reese on the first occasion, on November 4th——

[fol. 85] The Court: December 4th?

The Witness: December 4th, rather.

Q. Who was with you on the next occasion?

A. Deputy Marshal Dougherty.

Q. And who on the next occasion?

A. I wasn't on, on the next occasion. That was the last time I was aboard the Navemar.

Q. Just those two occasions?

A. Yes.

Mr. Ryan: Are Deputy Marshals Reese and Dougherty in the court room?

(The Chief Deputy Marshal reports they are both out on service.)

(Witness excused.)

MANUEL MARTINEZ, resumed the stand, and testified further as follows through the interpreter:

Direct examination.

By Mr. Ryan:

Q. Have you any personal belongings and effects now on board the Spanish Steamship Navemar?

A. All those mentioned in this sheet of paper, that is signed by me.

Q. What do you want done in connection with those personal effects?

The Court: How is that relevant?

Mr. Ryan: If the Court please, as long as he says he wants [fol. 86] to get them off the ship, I intend to ask the aid of the Court in having the personal effects of this man brought from the ship on shore so he can have them.

The Court: I shall entertain no such request. That is not an issue before me at all.

Mr. Ryan: All right. That is all, Captain.

If the Court please, this is a libel for possession, and these are effects on the ship which belong to the captain of the ship.

The Court: At the present moment I am not going to make any such order.

Mr. Ryan: I offer in evidence as Libellant's Exhibit 28 the list prepared by the captain of his personal effects now on board the Spanish Steamship Navemar.

The Court: Received.

(Marked Libellant's Exhibit 28 in evidence.)

FEDIRICO GOMEZ, resumed the stand, testified further as follows through the interpreter:

Direct examination.

By Mr. Ryan:

Q. Have you some personal effects on board the Spanish Steamship Navemar?

A. Yes, sir.

Q. Have you prepared a list of them?
A. Yes, sir.
[fol. 87] Q. Is that the list (indicating)?
A. Yes, this is the list.

Mr. Ryan: I offer that list in evidence as Libellant's Exhibit 29.

(Marked Libellant's Exhibit 29 in evidence.)

(Witness excused.)

ANGEL LECUMBERRI, called as a witness on behalf of the libellant, having been duly sworn, testified as follows, through the interpreter;

Direct examination.

By Mr. Ryan:

Q. What is your occupation, Mr. Lecumberri?
A. First engineer, chief engineer.
Q. On what ship?
A. Navemar.
Q. That is a Spanish Steamship?
A. Yes, sir.
Q. You are appearing here in response to a subpoena, a court order?
A. Yes, sir.
Q. When were you last on board the steamship Navemar?
A. On the 9th.
Q. December 9, 1936?
A. Yes, 9th of December, day before yesterday.
Q. Just before you came here in court, is that right, in response to the subpoena?
A. Yes, it was the first time I left the boat.
Q. Who was in command of the Navemar when you left her?
A. On the 9th—do you mean the 9th, when I left?
Q. When you left, yes.
A. The Committee.
[fol. 88] Q. What do you mean by "The Committee"?
A. The Committee of five men made up by the crew.
Q. Who were the members of that Committee?

A. Second officer, Rafael Crespo; the fourth assistant engineer, Manuel Freire; an apprentice, Jose Arana; an oiler, Gaspar Lopez; and steward, Antonio Sanchez.

Q. Who appointed that Committee?

A. The crew.

Q. Did the captain of the ship appoint that committee or approve it?

A. No, sir.

Q. Did you appoint it or approve it?

A. No, sir, I never appointed any one of them.

Q. When was that committee—when did that committee take charge of the Navemar?

A. On the 2nd day of December.

Q. Did the committtee countermand or interfere with orders given by you on the ship?

The Court: Don't lead.

Mr. Ryan: Strike it out.

Q. What did that committee do?

A. When the committee was formed they went ashore to look for instructions; whether from the Consulate or from someone with whom they were identified, I don't know.

Q. Then what happened?

A. The members of the committee came down to New Jersey—came ashore in New Jersey, joined the vessel, and then we anchored off in the Bay.

Q. That is, the Navemar was in New Jersey discharging her linseed cargo, is that right?

A. Yes, but the Committee was appointed after having concluded the unloading.

[fol. 89] Q. Then the ship came back over here to Brooklyn, is that right?

A. Yes, we came back to Brooklyn.

Q. Then what did the committee do?

A. The committee was not on board. They went for instructions.

Q. Did the committee issue any orders to the rest of the crew, if you know, before they went ashore?

A. I myself do not know anything of any order having been given. The only thing normal that I can say was that people came aboard to make some repairs, perhaps on the order of the committee.

Mr. Ryan: Are you sure you got that answer right?

The Court: He is sworn as an interpreter.

Mr. Ryan: I just wanted to ask him whether he got it right.

Q. Did you ever ask the Committee to have any repairs made?

A. One of the members of the crew asked me to give him a list of such repairs as would be needed on the vessel.

Q. What was that man's name?

A. Fourth assistant engineer, Raymond Freire.

Q. Manuel Freire?

A. Manuel Freire. I gave him the list. He took it to someone, the Consulate or somebody else, and then came back and told me that the repairs requested by me would not be made.

Q. Had you given a list of the repairs to the captain of the ship, Captain Martinez?

A. Yes, sir.

Q. What did the captain do then?

[fol. 90] A. The captain has told me he would issue orders to the effect that repairs were to be made.

Q. Then what happened?

The Court: Just a moment. Was your discussion with the captain about repairs before or after your talk with Manuel Freire?

The Witness: The first time I turned in my list of repairs, I turned it in to the master. The master went ashore. I then again was called upon to turn in a list of repairs by this man Freire, and of course the captain not being on board I had to turn the list over to this man.

Q. Then what happened in connection with the repairs?

A. People came on board to work.

Q. From where?

A. Robins Dry Dock.

Q. By whose orders?

A. Of the master.

Q. Then what happened when they came aboard, do you know?

A. In the customary way, the regular launch, certain men, most of them known to us already from previous voyages, came aboard to try to undertake the repairs. Their chief, whom I understand to be an engineer, came to my cabin to discuss the repairs to be made. The workmen went down to the engine to try to do the work and

they were stopped by the members of the committee, who told them that no work could be done on board without the sanction of the committee itself.

Q. Then what happened?

A. I was notified by the chief officer that the crew did not permit the people from the drydock to start the work. One of our seamen came to my cabin, where I was discussing [fol. 91] the matter with the engineer from the drydock, and told him in English what I understand was that no work could be done on board without the permission and sanction of the committee.

Q. Why didn't you use force to prevent these men from preventing the Robins Dry Dock gang from doing their work?

The Court: That is objectionable.

Mr. Ryan: All right.

Q. Why didn't you see to it that the work was done, that the captain had ordered?

The Court: That is objectionable.

Q. What did you do in an effort to have the work done that the captain had ordered?

A. I did nothing but wait for the captain so that he might issue the necessary orders.

Q. How many members of the crew approached you in connection with this preventing this repair gang from doing their work?

A. Approximately fifteen. I could not tell offhand.

Q. Did they approach you in a bunch or unit?

A. They came in a group. Of course, not all of them could come into my cabin, but they stayed around and told me that the work could not be done until the permission of the committee was obtained.

Q. Was their attitude threatening or not?

A. They took a very strong attitude. I would not call it threatening, but there was an implied menace, and I decided the part of wisdom would be to wait for the captain to issue orders.

[fol. 92] Q. How long has it been since the Spanish Steamship Navemar was in Spain or in Spanish possessions——

The Court: Why this?

Mr. Ryan: I want to prove that to the hilt, your Honor.

The Court: You have it proved; and there is no sense in the cumulation of this evidence.

Mr. Ryan: It is important.

The Court: We have it established, and unless there is contradiction, I am going to rule that there is enough in on that subject.

Q. Have you any personal effects now on board the Spanish Steamship Navemar?

A. Yes.

Q. Have you prepared a list of them?

A. Yes.

Q. Is that the list (indicating)?

A. Yes, sir, this is my signature.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 30.

The Court: It will be received.

(Marked Libellant's Exhibit 30 in evidence.)

(Witness excused.)

MARCELINO GARCIA, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Steamship business.

[fol. 93] Q. What connection, if any, do you have with the libellant, Compania Espanola de Navegacion Maritima?

A. I am president.

Q. How long have you been president of that company?

A. Ever since the company was formed.

Q. How many years ago was that company formed?

A. Since 1932.

Q. What other positions, if any, do you hold with that company?

A. I am president and director.

Q. Where was that corporation incorporated?

A. In Spain, under the laws of Spain.

Q. Does the company maintain an office for doing business here?

A. As agents.

Q. Where?

A. At 17 Battery Place.

Q. How long have you resided continuously in the Borough of Brooklyn, Eastern District of New York?

A. Thirty-four years.

Q. Is your wife an American citizen?

A. She is.

Q. Are your children American citizens?

A. They are.

The Court: What relevancy has this?

Mr. Ryan: Later on, if you want me to argue the point of law, I can show you the connection.

The Court: I want to know how it is relevant.

Mr. Ryan: It is only on one incidental point.

The Court: Let us get on to something that may be an issue.

Q. Who is the owner of the Spanish Steamship Navemar?

A. Mr. Manuel Diaz and myself.

[fol. 94] Q. Who is the registered owner of the Navemar, Spanish steamship?

A. Compania Espanola de Navegacion Maritima.

The Court: Where is the registration effected?

Q. Where was the registration effected?

A. The registration of the company was at Madrid.

The Court: No, of the vessel.

The Witness: The vessel, at Seville.

Q. That is, the home port of the vessel is Seville?

A. The home port of the vessel, yes, sir.

Q. What is your personal interest in the Compania Espanola de Navegacion Maritima?

A. Half the stock is mine.

Q. Who owns the other half of the stock?

A. Mr. Manuel Diaz.

Q. Where does he reside?

A. He resides in New York.

Q. How long has he been a resident here?

A. I couldn't tell exactly, but about thirty years.

Q. He is domiciled here, that is, does he have his family and home here?

A. Yes.

Q. And do you too?

A. Yes.

Q. Has the Compania Espanola de Navegacion Maritima ever transferred the steamship Navemar or consented to its transfer to anybody else?

A. No, sir.

Q. Has it consented or transferred the vessel to the Spanish Government?

A. No, sir.

Q. Has that company ever transferred or agreed to transfer the ship's registry to anybody else?

A. No, sir.

[fol. 95] Q. Has that company ever agreed that any endorsement be made on the ship's register that anybody else has any interest in the steamer?

A. No, sir.

The Court: I shall have to take an adjournment now. How many more witnesses have you, Mr. Ryan?

Mr. Ryan: Well, I have several here, but I think I can shorten them. If you will go on in the morning I will try to eliminate——

The Court: Monday morning at eleven o'clock.

Mr. Ryan: Well, the representative from the Robins Dry Dock is here and he will only be a few minutes.

The Court: All right. If it is only a few minutes, you may go ahead.

Charles William Stromberg, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Outside superintendent for Robins Dry Dock.

Q. In Brooklyn?

A. Yes.

Q. There has been testimony here that the captain of the Navemar ordered some repairs for that ship. What do you know about that subject and about the making of the repairs or efforts to make them?

[fol. 96] A. I was in charge of the men that went on board to do the repairs with Mr. Reese and Mr. Garcia of Garcia & Diaz. We had a hard time to get aboard the ship. When we finally got aboard we went to the engineers' room, Mr. Reese and myself.

The Court: When?

Q. When?

A. On the 2nd day of December, between ten and twelve in the morning.

Q. This month?

A. Yes.

Q. What happened?

A. We looked over the repair list that the chief engineer had. I left Mr. Reese there and I went down below to start the work. Some of my men were on top getting their clothes changed.

I went down in the stokehold, fire-room, to look over the work. When I got down there the second engineer came down with some of the crew and stopped me from going ahead with the work.

Q. Were those members of the crew who stopped you accompanied by the chief engineer or the captain of the ship?

A. No, the chief engineer was in his room. The captain was ashore at the time.

Q. Do you know who those men were who stopped you?

A. I do.

Q. Who were they?

A. I recall one of the men, second engineer.

The Court: What is his name?

The Witness: I don't know his name. I know him by sight.

[fol. 97] Q. Is he in the court room?

A. I don't think he is here. I am not quite sure.

Q. Are any of the men who stopped you from making the repairs that the captain of the Navemar had ordered in the court room?

A. No, but the men dressed up look a little different than with dirty overalls on, so I cannot tell.

Q. What did they do to stop you from making the repairs?

A. Well, they told me not to touch anything and to come up to the chief engineer's room. When I got upstairs, on top of the grating, the whole crew was up there apparently, and I went in the chief engineer's room. They told us not to touch anything, at least, they told the chief engineer they had sent a committee on shore that morning, I believe of five, one of the officers and four of the crew, to the Consul, I understood, to get instructions, and they had not come back, and until such time as they came back with instructions, nothing could be done.

So Mr. Reese tells them, "We will get the signed order from the captain," but apparently that was not good enough; they wanted an order from the committee, who went ashore to get instructions from the Consul.

(Witness excused.)

The Court: We will take a recess until eleven o'clock Monday morning for all purposes.

(Recess until Monday, December 14, 1936, at 11:00 a. m.)

[fol. 98] Brooklyn, N. Y., December 14, 1936.

Met pursuant to recess at 11:00 a. m.

Present: James W. Ryan, Esq.

The Court: Now, if you will speed this up, Mr. Ryan.

Mr. Ryan: I have subpoenaed duces tecum the five respondents to bring the shipping articles here this morning. Where are they?

The Court: I am sure I do not know.

Mr. Ryan: The Marshal has made his return of service on each of the five respondents.

The Court: Well, let it be noted.

Mr. Ryan: I would like the record to show that that subpoena has been duly served.

The Court: File your proof of service.

Mr. Ryan: I will get it.

The Court: Call your first witness.

MANUEL MARTINEZ, recalled, testified as follows through Manuel Noriega, interpreter:

Direct examination.

By Mr. Ryan:

Q. What is this book which I show you and which has been produced by the Spanish Consul General and referred to as the ship roll or log?

A. This is the roll of navigation in which there is stated the arrival at each port by the Spanish Consul, the cargo [fol. 99] it brings, whether it brings any passengers, and it is entered and cleared there, and besides where all of the crew of the boat is listed.

Q. Now, if the crew is signed on a voyage from Barcelona to New York and back to Barcelona, and if the ship is transferred or otherwise discharged by the owner at New York what is done in the ordinary course of business in connection with that book, if anything?

A. If that boat is bought by another Spanish National he is compelled to keep the same crew on board the boat, or else to send them back to the port from where they originated, and pay them all the expenses back to that port.

Q. Suppose the ship is sold to some third person not a Spanish National, what is done then?

The Court: Is he testifying as an expert on the law?

Mr. Ryan: Oh, no, the usual practice, what the practice is as to how the entries are made in that book, what entries are made in the ordinary course of business.

A. In that case this book is deposited with the Spanish Consul with a notation that the boat having been sold to a foreigner, to a third party, but the owner will be compelled, the original owner will be compelled to send all the crew back to Spain, and an entry made in the log, in the roll, to the effect that the crew was discharged and the circumstances.

Q. Is that the entry that would be made in the ordinary course of business in any case in which the crew is dis- [fol. 100] charged from their contract of employment with the ship owner at some port short of destination as named in the shipping articles, or not?

A. Yes.

Q. Is that the ship's roll of the Spanish steamship Navemar?

A. Yes.

Q. The book that you hold in your hand?

A. Yes, this. (Indicating.)

Q. Is there any entry in that book showing that any of the crew of the Spanish Steamship Navemar who was signed on the voyage by the owner of that steamship, Compania Espanola de Navegacion Maritima at Barcelona for a round voyage to the United States and South America back to Barcelona, have been discharged from that contract?

A. No, there is no entry of anybody having been fired because there hasn't been any cause for anybody being fired.

Q. Is there anybody on board the steamship Navemar who is not right now in the employ of the libellant, the Compania Espanola de Navegacion Maritima?

The Court: Didn't you cover that the other day?

Mr. Ryan: I did with the chief officer, that particular point.

The Court: Then why do we have to go through with it again?

Mr. Ryan: This is the captain, that is all.

The Court: I do not think it is necessary.

Mr. Ryan: All right, your Honor.

There was a pamphlet produced by the Spanish Consul [fol. 101] General last Friday referred to as the Rules and Regulations pertaining to the Crew which I had marked for identification as Libellant's Exhibit 13. I now offer that pamphlet in evidence as Libellant's Exhibit 13.

The Court: Received.

(Libellant's Exhibit 13 for identification marked in evidence.)

Q. This book, Libellant's Exhibit 13, which was produced by the Spanish Consul General, does it refer to any committee of the crew, and if so, what does it say?

The Court: The exhibit will speak for itself.

Mr. Ryan: Yes, it will.

The Court: Then you tell me what it says.

Mr. Ryan: I ask the interpreter to translate into English the short sentence or paragraph referring to the powers of any committee of the crew.

The Interpreter: Base No. 1: Recognition of organizations. The ship owner will recognize the association or associations lawfully constituted by their employees or workmen. The organization of owners will recognize the personality of the delegates of the aforementioned association of personnel.

Such claims that the crew will see fit to make regarding the lack of compliance with the laws, regulations, rules and [fol. 102] bases of work may be made to the captain by a member that the crew will designate, subject to the procedure that said crew will establish, and this representative will have to be heard by the captain without prejudice in any case of the powers of this captain.

It will also be the right of the crew to audit the just expenditure of the substance for maintenance, and the making of the menus on board the ship. This right will be exerted by means of an individual freely designated by the crew.

Q. A man named Diaz has been referred to in the testimony as having come on board the Navemar from on shore. Have you ever seen that man Diaz on board the Navemar?

A. No, sir.

Q. Is any committee of the crew ever permitted, under Spanish ordinary practice, on shipboard, to overrule the decision of the master of the ship or to take over command of the ship?

A. No, sir.

Q. Who are Garcia & Diaz of New York, if you know.

The Court: We have that in the record; I do not think you need any further testimony on the subject.

Mr. Ryan: I do not think that is in the record, your Honor. That is the reason I am asking it. I think——

A. Ship owners' agents in New York.

[fol. 103] Q. For what company?

The Court: It was testified to repeatedly on Friday afternoon.

A. Compania Espanola de Navegacion Maritima——

The Court: That was testified to on Friday afternoon.

Mr. Ryan: That particular point is not in the record.

The Court: It is in the record and I won't have it put in again. You had a stockholder and various others here who testified.

Mr. Ryan: If it weren't important I would not be desirous of putting this particular point in the record, because I do not want it in twice. But this point is not in the record because I searched yesterday through it, and that particular point is not in the record.

The Court: Have you got the record there?

Mr. Ryan: Yes, I have the record and I have searched through it. It is not in the record, and for that reason may we have the answer to that last question?

The Court: It will probably take longer to find it in the record than to hear it, so go ahead.

(Last two questions and answered repeated by the reporter.)

Q. What is this document, if you know?

A. This is the contract that the Compania Espanola de [fol. 104] Navegacion Maritima has with Linea Sud Americana.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 31.

(Marked Libellant's Exhibit 31 in evidence.)

Q. What is this document, if you know?

A. This is a bill of lading of the Linea Sud Americana.

Q. For the voyage on which she arrived at New York, or has just arrived?

A. Yes, it is of this voyage.

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 32.

The Court: Received.

(Marked Libellant's Exhibit 32 in evidence.)

Mr. Ryan: I am informed that the Marshal is out right now on the Navemar trying to get those shipping articles and bring them into court this morning.

The Court: You told me that the subpœna had been served.

Mr. Ryan: Mr. Walker of my office informed me Saturday morning that the Marshal was out on the Navemar serving the subpœnas on Saturday morning. That was before twelve o'clock on Saturday, and I understood that they were served on Saturday and were to be here this morning.

Ask the Marshal to come over——

[fol. 105] The Court: Please go ahead.

Mr. Ryan: I do not understand why that wasn't done.

The Court: You stated to me in no uncertain terms that the subpœna had been served.

Mr. Ryan: I was told by my assistant, Mr. Walker, that the Marshal was out there Saturday morning——

The Court: Please go ahead——

Mr. Rosenberg: May I——

The Court: I do not want to hear anything from you; you have no standing here. Please go ahead.

Have you finished with this witness, Mr. Ryan?

Mr. Ryan: If I may have an opportunity to just glance through my notes a minute, your Honor.

The Court: Do not let us waste any time.

Mr. Ryan: That is all, Captain.

(Witness excused.)

Jose Garcia, called as a witness on behalf of the libellant, having been duly sworn, testified as follows through the interpreter Manual Noreiga:

Mr. Ryan: I think this man will be merely cumulative; he was on the ship.

The Court: I do not understand why you have to burden [fol. 106] the record with anything other than just making out a prima facie case.

Mr. Ryan: I just brought him here because he was on the ship. In view of your Honor's statement, I do not think it is necessary to examine this witness. That is all.

(Witness excused.)

Mr. Ryan: If the Court please, Mr. Garcia is getting an original document which will be here at eleven o'clock or as soon after as he can get here; I thought it would take longer to examine the captain.

The Court: What does the original document show?

Mr. Ryan: There are two of them. This is the copy and this is the original of the companion one. It is the bill of sale of that ship by Ybarra & Company to Marcelino Garcia and to Manual Diaz, together with a companion document transferring the title to Compania Espanola de Navegacion Maritima.

The Court: They may be filed as soon as they get here, and they will be received in evidence.

Mr. Ryan: All right; I offer this document in evidence as Libellant's Exhibit 33, this being the contract of sale [fol. 107] dated Seville, January 18, 1932, from Ybarra to Marcelino Garcia and Manual Diaz.

The Court: Somebody will have to identify that.

Mr. Ryan: Yes, I understand, of the steamship Cabo Mayor. The ship's register in the present case already shows that that name has been changed to Navemar.

MALCOLM D. ISDALE, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ryan:

Q. What is your occupation?

A. Consulting engineer.

Q. How long have you been a consulting engineer?

A. Forty years.

Q. Have you had anything to do with the steamship Navemar on her last voyage here from Buenos Aires to New York, and if so, what?

A. I was instructed by the master to proceed on board to carry out certain repairs recommended by the chief engineer.

After I got aboard, I got to the chief engineer's room, and the foreman, together with eight men, went down into the engine room, or tried to get down into the engine room. Then I heard a commotion, and I asked the chief engineer what was the trouble. He said. "Well, the trouble"——

[fol. 108] The Court: No, he is not permitted to say what the engineer said.

Q. Just say what you saw and what was done.

A. There was a commotion; and suddenly a number of men came into the chief engineer's room. There was one man who spoke fairly good English; I do not speak any Spanish. I asked him what the trouble was, and he stated that the committee, four men and an officer, had gone ashore to the Spanish Consul for instructions regarding the ship,

and they had a meeting the night previous, and they had decided that there was no work to be done on the ship. So therefore they said the engineers could not go down below, the men that I brought.

The Court: Is that anything more than cumulative?

Mr. Ryan: He got the instructions from the master, that connects that up.

The Court: That has all been testified to by two witnesses.

Mr. Ryan: But this is the man that got the instructions from the master, that hasn't been testified to before.

That is all.

(Witness excused.)

[fol. 109] MARCELINO GARCIA, recalled, testified as follows:

Mr. Ryan: If your Honor please, I am now informed that the Marshal did serve that Saturday, but the Marshal who served it is out of the office just now. It was served Saturday, as I understand.

The Court: Go ahead.

Direct examination.

By Mr. Ryan:

Q. What is this document, if you know?

A. That is the document accrediting the purchase of the ship.

Q. By whom and from whom?

A. By Garcia & Diaz from the former owners, the Ybarra Company.

Q. What is the date?

A. It is dated Seville on January 18, 1932.

Q. That is the bill of sale or contract of sale, is it?

A. Yes, that is what we call the preliminary bill of sale.

Q. What ship is that?

A. That is the Navemar.

Q. Have you any other document?

A. I have the final document of purchase when the title passed direct from the former owners to the Compania Espanola de Navegacion Maritima.

Q. Will you produce it?

A. I have it here. (Producing papers.)

Mr. Ryan: I offer that in evidence as Libellant's Exhibit 34, and ask leave to substitute photostatic copies of [fol. 110] all the material parts dealing with the sale, and eliminating the mass of mere recitals in that.

The Court: The exhibit will be received and the privilege granted to substitute a photostatic copy.

(Marked Libellant's Exhibit 34 in evidence.)

Q. You have testified that you are in the business of operating steamers. To what countries and ports do you operate steamers?

A. World-wide.

Q. Including Spain?

A. Including Spain.

Q. To what ports in Spain have you been operating steamers?

A. All the way down from Tarragona, Barcelona, Valencia, around to Seville, and then the northern ports, Bilbao, Oviedo, and so forth, all those northern ports.

Q. In your ordinary course of business as such steamship operator have you or have you not acquired knowledge of what ports are in armed occupation of military forces adverse to the Spanish Government at Madrid?

A. I have.

Q. What is the status of Seville in that respect?

A. It is under the control of the troops of General Franco.

Q. Are those adverse or friendly to the Spanish Government at Madrid?

A. Unfriendly.

Q. Is that a military force or not?

A. A military force.

Q. Is it complete control or only partial control of Seville?

A. Complete control.

[fol. 111] Q. How long has that military force been in complete control of Seville?

A. Since about two days after the movement began.

Q. Some months ago?

A. About July, I would say July 19th or 20th.

Q. Of this year?

A. Of this year.

Q. Where is the active management being carried on of the libellant, Compania Espanola de Navegacion Maritima?

A. Here in New York.

Q. Who is the active executive head, who is the final authority in connection with the management?

A. I am.

Q. And you reside and do business in New York?

A. Yes, sir.

Q. What is this document that I show you, Libellant's Exhibit 31?

The Court: If it is in evidence the document shows what it is.

Mr. Ryan: I just want to show that it is the charter party.

The Court: Just ask him about it.

Q. Is the Spanish Steamship Navemar now under charter to a private company?

A. It is.

Q. To whom?

A. To the Linea Sud Americana, Inc.

Q. How much longer has that charter party to run before it expires?

A. It runs for a year from July 24th.

Q. Of this year.

A. July 24th of this year.

Q. Do you know whether war has been declared by the Spanish Government?

A. Not to my knowledge.

[fol. 112] Q. Have any of the crew of the Spanish Steamship Navemar asked to be discharged from their contract of employment with the libellant company, the Compania Espanola de Navegacion Maritima?

A. They have not.

Q. Have any of them been discharged from their contract of employment with the Compania Espanola de Navegacion Maritima?

A. No, sir.

Q. Is everyone on board the Spanish Steamship Navemar, so far as you know, one of your employees under your contract of employment, one of the libellant's employees?

A. Yes, they all are.

COLLOQUY

Mr. Ryan: That is all, Mr. Garcia.

The return of process by the Marshal is part of the records of the Court, as I understand it.

The Court: Yes, it is.

Mr. Ryan: I was so sure that that was all done Saturday. That was the instruction that I gave, and when I called up Mr. Walker said it was done, and I understood that was just what he was sent there for, to see that the subpoena was served.

Now, my assistant, Mr. Symmers, tells me he has just been up to the Marshal's Office, and there is no Marshal there at all right now.

The Court: Was there a return of process?

Mr. Ryan: Will you find out about the return of process?

Mr. Symmers: It hasn't been made yet.

[fol. 113] Mr. Ryan: Who was the deputy who served it?

Mr. Symmers: Dougherty.

Mr. Ryan: Find out where he is, and when he is going to be here.

The Court: I understand Mr. Symmers has already ascertained that the man is out there trying to serve it now.

Mr. Symmers: I asked the Clerk if he had made a return, but he had not made a return yet, and I therefore left instructions for him to come down here as soon as he came in. In the Marshal's office they did not know just where Mr. Dougherty was going, but he was out serving two or three other subpœnas. They do not know what they were; they may be in this case or some other, but he went out Saturday on the boat to serve our subpœna, he did that on Saturday.

Mr. Ryan: Your Honor, as it turns out, it isn't so important because the captain has testified that the ship's roll would contain an entry in the event that any person on the ship had left the ship, or that anyone had been discharged from their contract of employment. That is the book in which the entry should be made, according to the testimony of the captain.

When I made that statement I was under the assumption last Friday that it was like our American practice, that they would make an endorsement on the shipping articles.

The Court: I do not see why the case should not be kept open.

[fol. 114] Mr. Ryan: In view of that, I do not see it either, because the ship's roll does not contain any such entries at the present time.

The Court: Then you rest, do you?

Mr. Ryan: Yes, I rest; and as no appearance has been made by anybody, no general appearance by anybody, I ask for a final decree giving us possession of this ship now.

In that connection I want to call your Honor's attention to the fact that this ship has been served in rem, that each of the five respondents is an employee of ours and has been duly served with process, and the return of process as to each one of them is in the Clerk's records of this court.

The Court: In view of the default and failure to file an answer——

Mr. Rosenberg: Your Honor,——

The Court: Pardon me, you have no standing here. And the libellant having established a prima facie cause sustaining all the material allegations of the libel, a decree in conformity with the prayer will be granted, and the libellant is directed also to file findings of fact and conclusions of law.

Mr. Ryan: Yes, sir.

Mr. Rosenberg: Your Honor——

The Court: You have no standing.

Mr. Rosenberg: May I make a remark?

The Court: You may not.

[fol. 115] Brooklyn, N. Y., January 12, 1937; 9:45 a. m.

Before Hon. Clarence G. Galston, U. S. D. J.

Hearing on order to show cause why the default of the respondents should not be reopened and why Fernando de los Rios, Ambassador of the Republic of Spain, should not be permitted to appear as claimant.

Appearances:

Jesse L. Rosenberg, Esq., Proctor for His Excellency, Fernando de los Rios, Ambassador of the Republic of Spain, for the Motion, Appearing Specially by Horace T. Atkins, Esq.

Crowell & Rouse, Esqs., Proctors for Robins Dry Dock, Inc., by J. Dexter Crowell, Esq.

Bigham, Englar, Jones & Houston, Esqs., Proctors for Libellant. (Mr. Ryan's appearance noted at page 172 of the record.)

9:50 a. m.

Mr. Atkins: Ready for the motion.

The Court: You may proceed.

Mr. Atkins: If your Honor please, in the opinion which your Honor handed down in connection with the prior motion to reopen the default, your Honor, among other things, stated that there should be a substantial showing of a [fol. 116] meritorious defense, and, further, that there should be some explanation of the reason why a default occurred.

The Court: No; I said in my opinion that a sufficient explanation had been given.

Mr. Atkins: Had been given.

The Court: In respect to explaining the default. That leaves open the question of the meritoriousness of the defense.

Mr. Atkins: That is right, your Honor.

The so-called suggestion which was filed, that there was no allegation that at the time possession was taken by the Consulate General at Rosario the vessel was devoted to the public use or employed in carrying on operations of the Spanish Government, we have filed now in the proceedings an affidavit of the Consul in charge of the consulate in New York and the secretary of the Embassy, Luis Careaga, and in that affidavit we set forth the decree that was issued by the President of the Republic of Spain on October 10, 1936.

The Court: Of course, strictly speaking, your proceeding is wrong. You ought to file a petition with allegations, a verified petition. That you do not do. You did not do that the last time.

Mr. Atkins: We are here, your Honor, asking that the default be reopened. That has been a default against us and we wish to show a meritorious defense. If that default is opened, we will then file a petition.

The Court: I am sorry, but you do not understand me. Your petition should be for leave, not an affidavit. What is an affidavit? It must be a pleading, an averment.

Mr. Atkins: There has been an affidavit, of course, filed by [fol. 117] Mr. Rosenberg. It is not in form, true, of a petition——

The Court: Nor was the first. I am a little weary with both sides of trying to correct the practice that has been adopted. Now, your practice is bad again.

Mr. Atkins: If your Honor please, I mean, after all, don't we come into court by an affidavit, and your Honor signs an order to show cause why the default should not be opened?

The Court: And you do not know how close to not signing that order to show cause I was.

Mr. Atkins: And we pray that the default be reopened.

The Court: It should be in the form of a petition.

(James W. Ryan of Bigham, Englar, Jones & Houston enters the court room.)

The Court: Mr. Ryan, I must insist on your prompt attendance here. The last time the same delay occurred. I am obliged to get over to the Southern District, and, at very great inconvenience to myself, I set this hearing for 9:45. Here it is ten o'clock and you are late again, just as you were the last time.

Mr. Ryan: I am very sorry, my stenographer became ill last night and could not finish typing my papers, and I could not get them until this morning.

The Court: You could get over here anyway.

Mr. Atkins: The rendering of the return is in the nature of an explanation, and I think I should be entitled to read it, of course.

The Court: Go ahead.

Mr. Atkins: As to the meritorious defense, we say in our affidavit the decree, and the decree being Article 1, provides [fol. 118] that the Spanish State attaches the steamship Navemar; that the vessel remains a vessel in the service of the State, to be used for its national public service; this vessel will be managed by the Ministry of Communications and Merchant Marine through the Commercial Bureau of the Merchant Marine, and we have alleged that the decree was published and became—published in the Official Gazette of the Spanish Government and became effective upon publication.

We also allege that while the vessel was at Rosario or at Buenos Aires, I forget which for the moment, there was an endorsement made by the Consul on the ship's registry that by virtue of the decree the vessel had passed to be the property of the Spanish Government, that it has become the property of the Spanish Government, taken unto its use, and a similar endorsement is made on the ship's roll. Those are the two papers which, under the Spanish law, a Spanish vessel is required to carry.

It is also alleged in the affidavit that the vessel was held in New York at the instance of the Spanish Government for use to carry cargo from New York in behalf of the National Spanish Government, as distinguished from any private—in behalf of any private individual, and that the Spanish Government intended to so use the vessel in the future.

The Court: Is there any allegation that the vessel was loaded with cargo by the Spanish Government?

Mr. Atkins: On the contrary, that does not happen to be the fact. The vessel was taken over at Rosario, and, having [fol. 119] arrived in Rosario, as I recall——

The Court: When you say "taken over"——

Mr. Atkins: By the decree, just as this Government requisitioned vessels during the late war. That is exactly what we did.

The Court: I know what you tell me. I know what your argument is, your legal conclusion is. I am much more interested in the facts. Just as I indicated in my opinion, I want facts. I am not so much interested in the conclusions of law to be drawn from the facts.

Mr. Atkins: May I preface my argument just briefly, and I will do it briefly, and then come to those facts? I would like to point this out to your Honor, I think it has been overlooked, and I go to the second case of Pesaro, which your Honor mentioned in the opinion, and your Honor from that opinion, I take it, drew this conclusion that to indicate a meritorious defense the Government should show not merely that the vessel was the property of the Republic of Spain, but also that it was possessed by that Government and was operated by it, in its service and interest.

Now, on the question of the operation of the vessel, in the case of the Pesaro, that was a case, as your Honor knows, where the vessel was operated by the Italian Government for its commercial purpose, and yet it was operated—it was not subject to the maritime liens, which would be the same situation as though our Government operated its vessels as it does and did not have the suits in Admiralty Act, or not consent to be sued. And in that case they held that the vessel was immune from process, that the ques- [fol. 120] tion of whether the vessel was or was not an armed vessel was immaterial, and they bridged the gap of

some hundred years to the case of The Exchange, and they said that The Exchange was the closest case to it.

In the case of The Exchange, that was a case where a public armed vessel had, by decree, been taken over by Napoleon, had been brought into Philadelphia, and a possessory libel was filed in Philadelphia by an American citizen, and that is important. Even in that case it shows how much stronger our case is than was the case of The Exchange. The American citizen filed a libel and the District Court held that a public armed vessel of a foreign sovereign in amity with our Government is not subject to the ordinary judicial tribunals of the country—now, these words are important, I think—that is, "so far as regards the question of the title which the sovereign claims to hold to the vessel." And the Supreme Court, the Circuit Court having reversed the District Court—reinstated the judgment of the District Court, and again, in the case of the Belgenland——

The Court: Just a moment. How does that add any new thought to that which I expressed in my opinion?

Mr. Atkins: If your Honor please, there, it is an action, a possessory action brought by a Spanish corporation on a petition filed by a Spanish citizen against a Spanish vessel. And I also might point out, your Honor, that the Spanish Government was never served in that action in spite of the fact that there was an endorsement on the register of the ship at Rosario and also an endorsement on the ship's [fol. 121] roll, that the vessel had been taken over by the Spanish Government, and yet we have a possessory action against that vessel here in which they come before this Court and contest title, claiming ownership to the vessel, and a suit purely between citizens of a foreign country. And they did not permit it in The Exchange, when the libellants were American citizens.

The Court: Of course not. Why? Because the vessel sued by libel was a warship, public vessel.

Mr. Atkins: That is exactly the point that was covered in the second case of the Pesaro, that it makes no difference whether it is a warship or a private merchant ship.

The Court: No, but the Pesaro extended the doctrine of The Exchange by asserting that in this day and age the courts of this land will recognize that a ship in the service of a foreign government, be it a public service or a private

service, makes no difference, and the Supreme Court held that view despite the very learned, and to my mind, fascinating opinion written by Judge Mack in the lower court.

Mr. Atkins: I feel that if a government operates a vessel in private trade, the government should be subject to lien, I feel that way myself, and I think most of the admiralty bar, Judge Hough certainly did in the case of the Maple, and his words are so pertinent that I would like to read them. That was a case——

The Court: Pardon me, Mr. Atkins, for pressing you in the matter, but you say something was overlooked in the opinion. I have yet to be told what it was. Is it that you think that because the libellant here is a Spanish corporation that the same right should not be extended to that [fol. 122] libellant as should be extended to an American citizen?

Mr. Atkins: In so far as——

The Court: Yes or no?

Mr. Atkins: Yes, in so far as jurisdiction is concerned, particularly in the case of a possessory action.

The Court: But what is the ground of that?

Mr. Atkins: The Supreme Court in the case of the Belgenland said so in a question of the ownership of a foreign vessel, agitated between the subjects of the nation to which the vessel belonged. The English admiralty, upon objection being made to its jurisdiction, refused to interfere, the Consul of said foreign nation having declined to give his consent to the proceedings. They cite that case, the English case, with approval, and I have endeavored to point out to your Honor that in the case of The Exchange that was the only case involving a possessory action; that you have a possessory action here between citizens of a foreign state, and that the Court in that case should not take jurisdiction.

In a case like the Pesaro, a cargo damage case, it naturally became important to determine what was the occupation of the vessel at the particular time that that cargo damage arose. If at that time it was devoted to a public use, there was immunity; if at that time it was not devoted to a public use, if it was operated by private citizens of the foreign state, there would not be immunity.

And as I say, Judge Hough, I would like to read that, in the case of the Maple, there you have a Chilean vessel, which

was operated precisely the same way the Italians operated [fol. 123] the Pesaro, and it was a cargo damage case, and it was a private—I mean, it was not an armed vessel, and Judge Hough said, referring, I take it, to The Exchange, and the distinction between war vessels and so-called private vessels, "Why was a war vessel exempt from seizure? Not because it was a war vessel but because it was a part of the exercise or manifestation of the sovereign power. Why is any other vessel exempt? Why may any piece of property be exempt? For the same reason, just as the sovereign himself is exempt. Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic, empire or what-not, goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers, just as much as any private person, but I think it must be plain that if I, in my official capacity, were to assert that view and enforce it, I would be assuming in this case, as one of the humbler officers of the Government of the United States, to define for the Republic of Chile what that Republic should consider to be a governmental function. If the Republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile, and if we do not approve it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has heretofore been accorded to government property, then we must say so through diplomatic channels and not through the judiciary, otherwise the judiciary are really contributing to what might become, under conceivable circumstances, a [fol. 124] ca*u*sus belli. Therefore, not only because I feel there is no distinction between this case and the previous decision in the Maple case, but for the greater reason, that the question is not justiciable but diplomatic, the motion must be granted, however hard it may be on private persons, and I do think it is very hard."

And I come down to this case. The Court in a case between foreigners, the normal cargo case between citizens of the foreign states, may or may not take jurisdiction; the Court in a case of an injured seaman on a foreign vessel, and a foreign seaman, may or may not take jurisdiction, but those are tort matters.

The Court: Mr. Atkins, what you are apparently doing here is seeking to reargue the matter that was presented on the first order to show cause. I am not particularly interested in that. I said in my opinion, the order that was signed thereon, that the Republic of Spain might file another application, I wish I had said petition, if it conformed to, by the facts alleged, the conditions of the opinion. What you have been doing during the last ten minutes is to raise a question of law which, unfortunately for you, you did not raise on the original return, wherein you now seek to distinguish between the rights of an American citizen and the rights of a Spanish National, when your argument should be confined to the substance and merit of the facts.

Mr. Atkins: On the affidavit, if your Honor please, on page 5, we allege, having heretofore stated the—may I call it, the history of the vessel at Buenos Aires, its going to Rosario and back to Buenos Aires, and the sailings to New York, and the sailings of the Navemar, after October 15th, [fol. 125] that was when the first endorsement was made, as related by the sailings, were made at the direction and under the control of the representatives of the Spanish Republic.

We say that. I think we should be permitted to prove it.

On page 6 we recite that upon the arrival of the steamship Navemar in the Port of New York, the deponent, acting upon instructions from the Ambassador of the Republic of Spain, Fernando de los Rios, instructed Manuel Martinez, then master of the steamship Navemar, that the said master should await and abide further instructions from the deponent as regards any further use of the said steamship Navemar. On November 28th, deponent instructed Manuel Martinez, said master of the steamship Navemar, that the master should present the deponent as soon as possible a detailed account of the expenses of the Navemar, such as salary, food, and so forth, and thereafter Manuel Martinez did deliver to deponent an account of the crew of the boat and further delivered a statement setting forth certain contemplated repairs to be performed upon the vessel.

The Republic of Spain, as appears in the affidavit, made partial payments on account of salaries and wages of the master and crew of the Navemar and then the Republic of

Spain, in furtherance of the decree, relieved the then master from command and appointed another master.

We allege that at all times, if your Honor calls that a conclusion, that the vessel is subject to the use by the Republic of Spain for its national public service. Those words appear in the decree, under which it is alleged the vessel [fol. 126] was taken over, and then that the vessel was held in New York by the representatives of the Spanish Government for use by the Spanish Government to carry cargo from New York to Spain for purposes of the Spanish Government; that it was the intention of said Government to use said vessel for public service; that said vessel would have been so used but for the interference by the filing of the libel.

I submit, your Honor, that shows a meritorious defense to the claim in that the vessel was taken over by legal decree of the Republic of Spain, it became effective, and which was put into effect; and merely because, if you liked, the Government of Spain at Rosario or Buenos Aires did not physically take the vessel and then operate it, they awaited further instructions, if they were kind enough to permit the libellant in this case to fulfil the engagement to New York, I submit that should not prejudice the standing of the Republic of Spain in this court.

The Court: You allege that that fulfilment of the contract of carriage which bound the vessel was by sufferance of the——

Mr. Atkins: By sufferance.

The Court: Do you allege that?

Mr. Atkins: We do in this way, your Honor, that the vessel was under the control and subject to the Republic of Spain, and of course the vessel did come up, so I take it that it would be implied that it was by sufferance. I know it was by sufferance.

The Court: Mr. Ryan, what have you to say?

Mr. Ryan: If the Court please, the case of the Exchange has been referred to. In that case there was evidence of all [fol. 127] three factors, that the vessel was owned by the foreign sovereign, that it was in the possession of the foreign sovereign; that it was being operated in the service of the foreign sovereign as an armed warship.

I read from the Supreme Court opinion——

The Court: Don't do it. Don't read from that.

Mr. Ryan: Yes, I won't read it. In that case the Court held that the property of the libellant in that vessel had been divested within a port of the empire or a country occupied by its arms. That is the way they got ownership. In other words, title there was taken to the ship while the ship was in the foreign sovereign's territorial limits. The Supreme Court says so in so many words.

Second, the commission of the officer in charge of the vessel was produced, and absolute proof was made that the vessel was in the possession of the foreign sovereign.

Third, it was proved that the vessel was an armed warship and that she had been armed at Bayonne, and that she was in the government service of the foreign sovereign as an instrument of its sovereignty. Not one of those factors is shown in the present case. In the present case they say a decree was entered in Spain on October 10, 1936. Suppose it was? They do not allege that any property, or this vessel was anywheres within the territorial limits or the sovereignty or the jurisdiction of Spain at that time, or in Spain at any time since. That is the only claim they make to title, and it is absolutely void. If there were any question about it, United States v. Belmont, Circuit Court of Appeals for this Circuit, decides it. Even if the Spanish national were not domiciled in this country. The uncon-
[fol. 128] tradicted evidence is here, and they offer nothing in this showing to contradict it, that the libellant in this case was commercially domiciled in New York City, in the Port of New York, and had been ever since its incorporation. The United States Supreme Court has held in two recent decisions that makes the commercial domicile of that corporation New York City. In other words, this alien owner of this vessel, domiciled in the United States, comes within the long series of United States Supreme Court decisions, that he is entitled to the protection of the Constitution of the United States as a friendly alien resident in this country. Yick Wo v. Hopkins was one of that series, a very famous decision.

Counsel makes no answer to that argument whatever. Now they say that they are complying with this Court's opinion——

The Court: Do you contend that there is nothing in the point urged that the authorities make a difference between the status of an American citizen and of a foreign national in respect to whether this court should assume jurisdiction?

Mr. Ryan: Provided the foreign national is domiciled in the United States, yes, absolutely, it ceases to be a matter of of discretion; and even if they were not domiciled here, it is purely a matter of discretion with the Court, as an admiralty court, and the Belgenland so decided, and several other decisions have decided the same point.

The Court: As I have pointed out to Mr. Atkins, that matter was not argued before, and, strictly speaking, it is not before me now, but, nevertheless, since you are likely to brief the matter, I want you to cover that in your brief, [fol. 129] whether there is a difference in respect to the status of an American citizen and that of a foreign national in respect to whether this Court should take jurisdiction.

Mr. Ryan: Yes, sir, I shall, your Honor.

The Court: Now, then, Mr. Ryan, because time is limited for me——

Mr. Ryan: Yes, I am going to make this as short as I can.

The Court: If you will take up just the meritoriousness or lack of meritoriousness of what is shown in the order to show cause.

Mr. Ryan: All right, your Honor.

Your Honor has filed an opinion, your Honor has entered an order defining what your Honor meant by a meritorious defense, as indicated by the possibilities in the first application. The first application was properly denied. In my personal opinion, it should have been absolutely denied, but your Honor, out of graciousness, allowed them a second opportunity to come in on certain conditions. Your Honor specified them in detail in your opinion.

I respectfully submit that there is not one condition specified by your Honor in that opinion that has been complied with on this second application.

The Court: They say, Mr. Ryan, in respect of the element of possession, that the Navemar was in possession in Rosario or in the Argentine, also in possession in the Port of New York.

Mr. Ryan: There is not one word——

The Court: We are not concerned with the question of proof here.

Mr. Ryan: I understand.

[fol. 130] The Court: We are concerned merely with the question of allegations.

Mr. Ryan: There is not one word in this second application to suggest that the Navemar was taken possession of in Rosario or anywhere in the Argentine. That was in the first application, it is not in this one, and I ask counsel to show it to me, if it is in there. It isn't in there, and it is a very important point.

Mr. Atkins: The decree is set forth in the application. The application does recite that the vessel was in Rosario, it recites that it was in the Argentine, and it also recites that the Consul at Rosario, in Buenos Aires, entered an endorsement on the ship's roll, and a recitement that that was done by virtue of the decree, and it also recites that the Consul of the Argentine entered an endorsement on the ship's register, which is really the document of title.

The Court: You do not have to worry about words here. The real difference between you is that what you are in effect urging is a constructive possession, not a physical possession. Now, isn't that true? Do not let us beat around the bush.

Mr. Atkins: Without beating around the bush at all, I say it was an actual possession.

The Court: A physical possession?

Mr. Atkins: If your Honor please, we have on the ship's document of title a statement that it is passed, by virtue of a decree of the Republic of Spain, to become the property of the Republic of Spain.

The Court: All right, Mr. Ryan, let us go on.

Mr. Rosenberg: May I say a word?

Mr. Ryan: That is the point I wanted to stress, your [fol. 131] Honor. This application differs from the first one and does not comply with your Honor's opinion, and he is referring to the ship's roll or the ship's register as the document of title. Every decision in this country and in England is to the contrary. The only document of title of a vessel is the bill of sale, and the bill of sale was introduced in evidence at the trial of this case. It is in the Court's possession.

The Court: Just a moment. When a Government confiscates a vessel it does not obtain a bill of sale, so there must be an exception to what you say is the general rule.

Mr. Ryan: When a Government confiscates a vessel, it has to be within its territorial limits. Then what the Government does is, it puts a man on board and that officer is commissioned as an officer of that Government.

The Court: Wait a minute.

Mr. Ryan: There is no allegation of that.

The Court: I just want to keep you from insisting upon a proposition that is not tenable.

Mr. Ryan: Yes.

The Court: You say wherever title passes a bill of sale is given. That cannot be true in the case of a governmental confiscation.

Mr. Ryan: Of course, your Honor, there is an exception, if the confiscation is of a vessel in the territorial limits of a foreign sovereign, but in that case, the possession has to be taken as an actual possession with an officer or agent of the foreign sovereign on board, in the service of that foreign sovereign.

The Court: That may be.

[fol. 132] Mr. Ryan: There is no allegation of that in this second application whatever.

Now, your Honor said that a meritorious defense here would consist of several different facts, I won't go through them, they are in your Honor's written opinion, and the second application has to comply with those terms. There is no allegation of any of them. Here is the first one: there is no allegation in that paragraph or elsewhere that at the time the alleged possession of the steamship Navemar was taken by the Consul General of Spain located at Rosario the vessel was devoted to the public use or employed in carrying on the operations of the Spanish Government. There is no such allegation in this second application. Indeed, there is no allegation that the vessel was ever at Rosario, nor any showing of where or when the Government at Rosario took possession of the steamship Navemar. There is no evidence that the Consul General at Rosario took possession of her. The uncontradicted evidence in the record is the vessel was not even at Rosario at the time they say the Consul of Spain took possession of her. There is nothing stated as to the subsequent use of the vessel by the Republic of Spain, there is nothing in this second application showing the subsequent use of the vessel after they supposedly took this possession at Rosario.

The affidavit we have filed here of the master of this ship, as part of our return, supplementing the evidence taken at the trial, produces the subordinado, the official document of the ship, which shows the freight actually earned, the freight actually collected, to whom it was payable and to

[fol. 133] whom it was paid, and that was to a private corporation, Linea Sud Americana.

Absolutely nothing was earned on this voyage by the Republic of Spain; the Republic of Spain had absolutely nothing to do with it. When the ship came to New York, according to the affidavit of the master of the ship, the Consul General of Spain at New York said, "I don't know anything about it; I don't know about the Republic of Spain having any right in this ship or any interest in the ship at all."

The Court: Yes, but nevertheless, if I am correct in this understanding of what Mr. Atkins says, the Consul General alleges that he took possession of the ship here by ordering the crew to do thus-and-so and by paying its wages and what-not.

Mr. Ryan: All right, your Honor. We have the affidavit——

The Court: In other words, Mr. Ryan——

Mr. Ryan: Yes.

The Court: One must be rigidly logical in this matter. I haven't to do at this stage of the proceeding with proof, but merely with allegations.

Mr. Ryan: All right, your Honor.

The Court: Now, you get that, do you?

Mr. Ryan: I understand that.

Now, after a final decree has been entered, when a man comes in and says, "I want you to upset everything you have done, and upset that final decree," he has to come in and do more than just make a vague statement, or general statement, and no merit in it. Your Honor has so decided, and it is the law under all the authorities.

[fol. 134] I grant you that in this second application they say they manned the vessel.

Mr. Atkins: The Consul says——

Mr. Ryan: The Consul says. I say that statement is absolutely contrary to the fact, contrary to every circumstance in the record, and it is absolutely disproved by the ship's own official documents, by the shipping articles, the contract of employment of the ship, showing that every man on board that ship was in the service of the libellant company, Espanola, every man on board.

The Court: Just a moment. After all, there must have been some situation that existed that forced you, in order to get possession, to initiate a process here. The ship ap-

parently was not in your possession at that time. In whose possession was it?

Mr. Ryan: Our employees on board the ship, nobody but our employees, just our employees, mutinied, became insubordinate, and tried to take possession away from the master of the ship and from the officers of the ship. We have proved that to a demonstration on the record.

The Court: Just a moment.

Mr. Ryan: Now, we sued them and the ship——

The Court: Just a moment. You say that the crew mutinied, and, indeed, you go further and say you gave proof of that, and a decree was entered, but now they say, apparently, "No, there was no mutiny. We, the Republic of Spain, took possession and the crew acted for us, did not act for the libellants." Now, I am concerned now with whether proof can be given by one side or the other. I am concerned with an issue of fact, am I not?

[fol. 135] Mr. Ryan: You are, your Honor.

Now, am I not entitled to know when they say they took possession of the Navemar? On what date? Now—this moment I do not know. When did you take possession of this ship?

Mr. Atkins: The affidavit sets it forth.

Mr. Ryan: Will you tell me the date?

Mr. Rosenberg: May I read the letter?

Mr. Ryan: No, no. I want the date you took possession of this ship.

Mr. Atkins: The decree was executed by the President of the Republic of Spain on October 10th, was published in the Official Gazette on October 11th, and it respected the Navemar, the ship was named, and constructively we took possession then. Actually we notified, through our Consul, the officers of the ship at Buenos Aires, and in spite of that notification—I am going to answer you—in spite of the notification, the libel proceeding was started for possession and the Consul is not, or the Republic of Spain is not, made a party. Some crew were made a party.

The Court: Do you think that is an answer to Mr. Ryan's question?

Mr. Atkins: I think we took possession of it when we—actual possession of it—when we permitted the captain to sail to New York.

The Court: Then the answer——

Mr. Atkins: May I——

The Court: Really, I have to get answers to my questions, if you are here as a supplicant. Unless you are willing to answer my questions, I cannot do anything for you.

Mr. Atkins: Mr. Ryan has asked the question.

The Court: I want a categorical answer, a definitive [fol. 136] answer, to Mr. Ryan's question: When do you claim you took physical possession of that vessel and where?

Mr. Atkins: We took possession—we took it on, I will put it, October 28, 1936.

The Court: Where?

Mr. Atkins: At—we were in possession of it on October 28, 1936.

The Court: When did you take possession?

Mr. Atkins: On October 16, 1936.

The Court: Where?

Mr. Atkins: Wherever the vessel was at that time.

The Court: I don't know where it was.

Mr. Atkins: I don't know.

Mr. Rosenberg: Buenos Aires.

Mr. Atkins: No, she arrived in Buenos Aires on—yes, at Buenos Aires. We gave notice of it on October 28th, and the master recognized it on October 28, 1936, that possession of the S.S. Navemar was taken by the Spanish Government, and the vessel was confiscated by the decree of October 10th, and that is the master writing to the owners—to the prior owners of the Navemar.

The Court: That is the best answer you can get.

Mr. Ryan: I am prepared to show right now by the affidavit that we filed here of the master, by the written admission of the Spanish Consul himself, that possession—Luis Careaga—possession was not taken at that time and Luis Careaga was attempting to take possession on November 28, 1936, at New York City. And the letter of the Consul General, Luis Careaga, is annexed to the affidavit here of [fol. 137] the master of the ship, and it is on page 10 of his affidavit, translated into English, and here is what it says——

Mr. Atkins: It has not been served upon me.

Mr. Ryan: Yes, it has, I served it upon you at the argument because the stenographer just finished typing it, and I handed it to you. It was filed with the Clerk before I came down.

Here is what that letter says, and it is terribly important in view of that admission of counsel: The letterhead is the letterhead of the Consul General of Spain, 515 Madison Avenue, New York——

(To the Clerk of the Court:) Here is a photostat of the letter, this should have been added, that should have been slipped in there, that is a photostat of the original.

(Continuing:) Consul General, Spain, 515 Madison Avenue, New York,——

Mr. Atkins: What page is that?

Mr. Ryan: Page 10 of the affidavit. That is in Spanish. The translation in English is on page 10 of the affidavit.

"Consul General of Spain, New York, No. 2988. In replying mention number of this letter. New York, November 28, 1936.

"It is my duty to inform you as per instructions received from His Excellency, the Ambassador of the Nation in Washington, the ship at your command is from this date at the disposition of the Government of the Republic and you must await new instructions from him of anything concerning future activities, and give me at the earliest possible moment a detailed statement of the expenses of said ship, [fol. 138] such as salary, victuals, etc., as well as a relation of the repairs of small importance that you are at present having effected.

"Signed Luis Careaga, Spanish Consul General.

"Addressed to Manuel Martinez, Captain of the Spanish Steamship Navemar."

If your Honor will compare that with page 5 of the present, second application of the Spanish Ambassador, the bottom paragraph, the affidavit he files here today, notice what he says:

"Upon the arrival of the said steamship Navemar in the Port of New York"—now, the ship arrived here, on the record, on November 25th—"that deponent, acting upon instructions from Fernando de los Rios, instructed the master, said master, to await and abide further instructions from deponent as regards any further use of the said steamship Navemar."

I submit to your Honor, is that a fair statement of the facts, a fair disclosure to your Honor of the actual facts as shown by the signed letter by their own Consul General? Doesn't obviously——

The Court: This continues to be a fascinating discussion, but I am sorry. I have my obligations in the Southern District and I have to suspend the argument now.

Do you want time within which to file briefs?

Mr. Ryan: Your Honor, I am arguing a terribly important case in the Supreme Court of the United States on Thursday, and it may run over into Friday.

The Court: I am asking this: I don't want to be inundated with briefs, as I was in the last application. I am [fol. 139] quite willing to give you such time as you want, but I want only one brief from each side. I look at you, but I am talking about Mr. Ryan. How much time do you want?

Mr. Ryan: Your Honor, this delay is so serious to my client, and this thing is costing so much, I don't think I am going to ask for any time. I will leave it to your Honor. I will do it as fast as I humanly can.

The Court: You say you are engaged in Washington?

Mr. Ryan: Just on Thursday.

The Court: Next Monday, is that time enough?

Mr. Ryan: That is time enough—I suggest you might make it Tuesday.

The Court: That is a week from today, the 19th, and file the papers, please, with the Clerk of the Court, not with me.

Mr. Ryan: Now, your Honor, may I ask one thing, that I think I am entitled to? At the last argument, the other side filed some document with your Honor, of which they did not serve me a copy. I have demanded it at least fifteen times, and I have not got a copy.

The Court: That is too many times. Give him a copy, Mr. Atkins.

[fol. 140] IN UNITED STATES DISTRICT COURT

Present: Honorable Clarence G. Galston, United States District Judge.

In Admiralty. No. 15,102

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant,

against

Spanish Steamship "NAVEMAR," Her Engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ, Respondents

FINAL DECREE—December 14, 1936

This cause having come on regularly to be heard on the pleadings and proofs herein, and having been duly submitted to the Court, and due deliberation having been had, and it appearing that the process on the libel herein was duly served on each of the respondents, and that the process has [fol. 141] been duly served in rem on the Spanish Steamship "Navemar," and it appearing that no answer or general appearance has been filed by any of the respondents or by anyone claiming an interest in said Steamship "Navemar," and proofs having been taken in open Court establishing the ownership and right to possession of the Spanish Steamship "Navemar" as being in the libellant, and good cause appearing therefore, it is hereby

Ordered, Adjudged and Decreed, that the libellant is entitled to the possession of the Spanish Steamship "Navemar," and it is

Further Ordered, Adjudged and Decreed, that the United States Marshal for the Eastern District of New York be and he hereby is directed to deliver possession of said Spanish Steamship "Navemar" to the libellant; and it is

Further Ordered, Adjudged and Decreed, that any and all persons now on board the Spanish Steamship "Navemar" who claim any interest in her adverse to the libellant or whom the libellant desires to have removed from the said Spanish Steamship "Navemar" be and they hereby are directed to leave the Spanish Steamship "Navemar".

Clarence G. Galston, United States District Judge.

[fol. 142] IN UNITED STATES DISTRICT COURT

[Title omitted]

MARSHAL'S RETURN ON FINAL DECREE

On the 14th day of Dec. 1936, I executed this Final Decree by boarding the Spanish Steamship "Navemar" and assembling the crew aboard, on deck and by reading the within Final Decree to all said crew on board, and by having it read immediately afterwards to all of said crew in Spanish language by an interpreter, Manuel Noriega at my direction.

I then told the crew that the libellants, the Compania Espanola de Navegacion Maritima, S. A., were in possession of the Steamship "Navemar" and from then on Capt. Martinez was in charge of the Steamship "Navemar" on behalf of the libellant. I had my aforesaid statement translated to the Spanish language to the crew by the interpreter Manuel Noriega.

Albert C. Benninger, U. S. Marshal, E. D. N. Y.,
per Robert G. Lindsay, Chief Deputy.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE AND SUGGESTION (FIRST APPLICATION)
—December 16, 1936

On reading and filing the annexed Suggestion of Fernando de los Rios, Ambassador of the Republic of Spain, duly accredited to the United States, by Luis Careaga, Acting Consul General of the Republic of Spain, verified the 15th day of December, 1936, and on all the pleadings and proceedings heretofore had herein,

[fol. 144] Let, Compania Espanola de Navegacion Maritima, S. A., show cause before this Court at a stated term to be held in the United States Court House, Borough of Brooklyn, City of New York, on the 23rd day of December, 1936, at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard, why the default of the respondents should not be reopened and why Fernando de los

Rios, Ambassador of the Republic of Spain, should not be permitted to appear specially as claimant of the said steamship Navemar, and why the decree heretofore entered herein on the 14th day of December, 1936, should not be set aside and vacated, and why process theretofore issued in the premises should not be vacated and why this Honorable Court should not direct the United States Marshal to turn back said steamship Navemar to the said Luis Careaga to be held by the said Luis Careaga for and in behalf of the Republic of Spain, and why such other and further relief as to this Court may seem just should not be granted.

Service of this order and all the papers annexed thereto shall be sufficient if made upon Compania Espanola de Navegacion Maritima, S. A., or its proctors, Bigham, Englar, Jones & Houston, and on Robins Dry Dock, Inc., or its proctors, Crowell & Rouse, and on Thomas A. McDonald, proctor for Manuel Freire, et al., on or before 18th of December, 1936.

Dated, Brooklyn, New York, December 16, 1936.

Clarence G. Galston, U. S. D. J.

[fol. 145] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUGGESTION

Now comes Fernando de los Rios, Ambassador of the Republic of Spain, duly accredited to the United States, by Luis Careaga, acting Consul General of the Republic of Spain, being theretofore duly authorized and appearing specially herein by Jesse L. Rosenberg, respectfully suggests to this Honorable Court as follows:

First. That said Luis Careaga is the Acting Consul General of the Republic of Spain with his official residence at New York City, and has been duly authorized by the Ambassador of the Republic of Spain to act in the above entitled proceedings on behalf of the said Ambassador.

[fol. 146] Second. A libel has heretofore been filed in this Court by Compania Espanola de Navegacion Maritima, S. A., alleging ownership of the Spanish Steamship Nave-

mar, against the Spanish Steamship Navemar and against certain respondents, citizens of the Republic of Spain, in which libel it is alleged, among other things, that libellant is the owner of the Steamship Navemar and that as such is entitled to the possession of the said steamship.

In said libel, it is further alleged that libellant is a corporation duly organized and existing under the laws of the Republic of Spain, and the sole person entitled to her possession; that in the month of October, 1936, while the master, officers and crew employed by libellant were on board the said steamship the members of the crew of said steamship wrongfully, unlawfully and forcibly deprived libellant of possession of the steamship and have since continuously withheld her from the libellant by unlawfully and forcibly seizing, asserting and exercising exclusive control over the Steamship Navemar.

Third. The said Luis Careaga in his official authority and capacity aforesaid represents to this Honorable Court that in the month of October, 1936, the Consul General of the Republic of Spain at Rosario, Argentina, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the said Steamship Navemar, in the name of the Republic of Spain under a decree of the Republic of Spain dated the 10th day of October, 1936, whereby the said Steamship Navemar then [fol. 147] and there became and at all times since has remained the property of the Government of the Republic of Spain.

Fourth. That the Steamship Navemar is now and has been since October 10, 1936, the property of the Republic of Spain.

Fifth. That the said Republic of Spain has never consented that the said steamship be seized or proceeded against by judicial process or that the Republic of Spain be sued in respect thereto.

Sixth. That by virtue of the premises aforesaid the said Steamship Navemar is immune from arrest and not subject to the judicial process of this Honorable Court.

Wherefore, the said Fernando de los Rios, Ambassador of the Republic of Spain, as aforesaid, in his official capacity, respectfully prays that the decree heretofore en-

tered herein on the 14th day of December, 1936, be set aside and that process theretofore issued in the premises be vacated; that this Honorable Court direct the United States Marshal to turn back said Steamship Navemar to the said Luis Careaga, to be held by the said Luis Careaga for and in behalf of the Republic of Spain; that all persons who have heretofore filed libels and/or claims against the said Steamship Navemar in this Court be forever restrained from prosecution thereof; that the said Fernando de los Rios, Ambassador of the Republic of Spain in his official capacity for and in behalf of the Republic of Spain [fol. 148] may have such other and further relief in the premises as in law and justice he may be entitled to receive.

(Signed) Jesse L. Rosenberg, Proctor for Fernando de los Rios, Ambassador as Aforesaid, Appearing Specially. Luis Careaga, Acting Consul General of the Republic of Spain.

Duly sworn to by Luis Careaga. Jurat omitted in printing.

[fol. 149] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO SUGGESTION

The answer of the libellant Compania Espanola de Navegacion Maritima, S. A., to the Suggestion and Special Appearance filed herein by Fernando de los Rios, Ambassador of the Republic of Spain, respectfully alleges and shows:

First. Libellant denies each and every allegation in said Suggestion and Special Appearance, excepting that it admits that it filed a libel in the above entitled action, for the terms of which it refers to the original libel on file with the Clerk of the above-entitled Court.

Second. Libellant denies that the Consul General of the Republic of Spain at Rosario, Argentina, took possession in the month of October, 1936, of the Steamship Navemar, as [fol. 150] alleged in the Third Article of said Suggestion and Special Appearance, or otherwise.

Third. Libellant denies that the Republic of Spain has ever owned or possessed the Steamship Navemar.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE

The libellant Compania Espanola de Navegacion Maritima, S. A., as and for its return to the order to show cause [fol. 151] dated the 16th day of December, 1936, returnable on the 23rd day of December, 1936, obtained by Fernando de los Rios, Ambassador of the Republic of Spain, respectfully alleges and shows:

1. Libellant submits and files herewith its exceptions and objections to said order to show cause and to the Suggestion and Special Appearance of said Fernando de los Rios annexed to said order to show cause and filed herein.

2. Without waiving any of said exceptions or objections, libellant submits in evidence as part of its return the complete Transcript of the Record and Exhibits in the above-entitled cause.

Wherefore, libellant prays that said order to show cause be vacated and set aside and that said Suggestion and Special Appearance of said Fernando de los Rios be dismissed.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS AND OBJECTIONS TO ORDER TO SHOW CAUSE

The libellant, Compania Espanola de Navegacion Maritima, S. A., respectfully excepts and objects to the order to show cause, dated the 16th day of December, 1936, returnable on the 23rd day of December, 1936, obtained by Fernando de los Rios, Ambassador of the Republic of Spain,

and to the granting of any of the relief prayed therein, and to the Suggestion and Special Appearance of said Fernando de los Rios annexed to said order to show cause and filed herein, on the following grounds:

1. After final decree has been entered no one can properly be heard in support of a motion to vacate it excepting a party who appeared in the action or a person who asks leave [fol. 153] to appear in the action and submit to the jurisdiction of the Court. There would be no reason for vacating a final decree to permit a person to appear especially for the purpose of suggesting that he is not bound by the final decree or by any action the Court may take.

2. Insufficient evidence has been presented or showing made to warrant the Court in drawing the inference that there is any reasonable ground for believing that the Final Decree entered herein is in any material respect incorrect, or that substantial evidence exists of any fact which is material and which would cause a change in said Final Decree.

3. Insufficient showing has been made to warrant the Court in inferring that, if said Final Decree be vacated, said Fernando de los Rios will have available, and will introduce, substantial evidence to establish any fact which is material and which, if established, would require a change in said Final Decree.

4. Insufficient showing has been made to warrant the Court in inferring that any substantial evidence is now available to said Fernando de los Rios or to Luis Careaga or to Jesse L. Rosenberg, whose names are signed to the end of said suggestion, which was not available to said persons during the trial of this cause and before the Final Decree was entered.

5. Insufficient showing has been made to warrant the [fol. 154] Court in inferring that any substantial evidence is now available to said Luis Careaga or to said Jesse L. Rosenberg which was not available to said persons when they were personally present during part of the trial of this cause.

5a. Insufficient showing has been made to warrant the Court in inferring that said Fernando de los Rios is in possession of any evidence which would reasonably tend to cause any material modification in the Final Decree, and

which was not in the possession of said Luis Careaga or said Jesse L. Rosenberg during the trial of this cause and before the Final Decree was entered.

6. Insufficient showing has been made to warrant the Court in inferring that said Fernando de los Rios did not have knowledge before the Final Decree was entered that this cause was pending and was on trial and did not have reasonable opportunity to appear and present at said trial any evidence that he now seeks to introduce.

7. Insufficient showing has been made to warrant the Court in inferring that said Fernando de los Rios will introduce any evidence whatever if said Final Decree is vacated.

8. Insufficient showing has been made to warrant the Court in inferring that, if said Final Decree be vacated, said Fernando de los Rios has available or will introduce any substantial evidence in support of the statement or allega-
[fol. 155] tion in the Third Article of said Suggestion and Special Appearance that the Consul General of the Republic of Spain at Rosario took possession of the Steamship Navemar in October, 1936, or at any other time.

9. Insufficient showing has been made to warrant the Court in inferring that at any time since October, 1936, anyone representing or in the service of the Republic of Spain has been in possession of the Steamship Navemar.

10. The said order to show cause is not proper practice or a proper method of raising the issues sought to be raised by it.

11. The said Suggestion and Special Appearance are not proper practice or a proper method of raising the issues sought to be raised by them.

12. The persons presenting said Suggestion and Special Appearance are not entitled to appear now by Suggestion and/or Special Appearance.

13. There is no affidavit or showing by any person who has personal knowledge of any fact which would materially affect said Final Decree.

14. There is no affidavit or showing by any person who has information and belief of any fact which would materially affect said Final Decree.

15. No satisfactory reason is shown for waiting until after the Final Decree was entered before presenting or filing the [fol. 156] said Special Appearance and Suggestion.

16. No satisfactory reason is shown by said Fernando de los Rios or said Luis Careaga for not entering a general appearance and filing a claim in accordance with the Rules of the above entitled Court.

17. Insufficient showing has been made that the Steamship Navemar, at the time the decree of the Republic of Spain dated the 10th day of October, 1936, was issued, or at any time since, has been within Spain or her possessions or at any other place at which said decree might have extraterritorial effect.

18. Insufficient showing has been made that the Steamship Navemar was in possession of the Republic of Spain at the time the above-entitled Court took possession of her through the United States Marshal for the Eastern District of New York.

19. Insufficient showing has been made that the Steamship Navemar was in possession of the Republic of Spain at the time the process was served under the libel in the above entitled action.

20. Insufficient showing has been made that the ownership or property of the Steamship Navemar has at any time been in the Republic of Spain.

21. Insufficient showing has been made that said Luis Careaga, Acting Spanish Consul General at New York City, has ever been in possession of the Steamship Navemar.

[fol. 157] 22. Insufficient showing has been made that any agent of the Republic of Spain has ever been in possession of the Steamship Navemar.

23. Insufficient showing has been made that any of the master, officers, or crew of the Steamship Navemar was ever discharged from the shipping articles or contract of employment with libellant at any time before the above-entitled Court took possession of said Steamship through the United States Marshal for the Eastern District of New York.

24. The action of Jesse L. Rosenberg, Proctor for said Fernando de dos Rios and said Luis Careaga, in asking and

obtaining from the above entitled Court an extension of time of forty-eight hours within which to appear and answer and cross examine the libellant's witnesses constituted a general appearance in the above entitled action.

25. The action of Jesse L. Rosenberg, Proctor for said Fernando de los Rios and said Luis Careaga, in asking and obtaining from the above-entitled Court an extension of time of forty-eight hours within which to prepare for cross examination of the libellant's witnesses and prepare his own case in rebuttal estops and precludes him by reason of laches and unreasonable delay from asking or receiving that privilege or right from the Court at this late date after Final Decree has been entered.

26. The statements in the said Suggestion and Special Appearance are refuted by the Steamship Navemar's own ship's documents or official credentials, which are already in [fol. 158] evidence in the above entitled action, and part of which were produced by said Luis Careaga himself at the trial of the above-entitled action. If any documents or credentials to the contrary existed he would obviously have produced them or mentioned them at that time.

27. The said Suggestion and Special Appearance are an attempt to have this Court give extraterritorial effect within the United States to a decree or law which was enacted in Spain and which affected only vessels which were then within Spanish territorial limits or which thereafter came within Spanish territorial limits, and there is no showing that the Steamship Navemar at the time the decree or law was enacted, or at any time since, has been within Spanish territorial limits.

28. The said Suggestion and Special Appearance are an attempt to have this Court enforce as to a vessel which is in the possession of her owner who is commercially domiciled within the United States a confiscatory decree which was enacted in a foreign country and which is applicable only to vessels or property within that foreign country.

29. Insufficient showing has been made that the decree of the Republic of Spain dated the 10th day of October, 1936, was in accordance with the Constitution and laws of Spain, or would have any legal effect of transfer of title, property, or possession even if the Steamship Navemar had been

[fol. 159] within Spanish territorial limits at the time the decree was issued, or thereafter.

30. The said Suggestion and Special Appearance are improper and insufficient in that an Ambassador or diplomatic representative of a foreign sovereign does not have access to courts of the United States excepting for the purpose of entering a general appearance and instituting a suit in the name of that foreign sovereign and thereby submitting to the Court's jurisdiction.

31. The said Suggestion and Special Appearance are improper and insufficient in that they constitute an attempt by an Ambassador, who is a diplomatic representative, to appear and act through an Acting Consul General, who is a commercial representative.

32. The said Suggestion and Special Appearance are improper and insufficient in that they constitute an attempt by an Ambassador, who is a diplomatic representative of a foreign sovereign, to appear and act through a private citizen of the United States, Jesse L. Rosenberg, who is an attorney at law and a member of the Bar and an officer of the above-entitled Court and certainly subject to its general jurisdiction.

33. The said Suggestion and Special Appearance are improper and insufficient in that they constitute an attempt by the diplomatic representative of a foreign sovereign to exercise a sovereign prerogative within the territorial limits of the United States by claiming immunity and freedom [fol. 160] from the above entitled Court's jurisdiction and process of a privately-owned merchant vessel which is within the United States and whose private owner is domiciled in the United States and which has never been in the possession of the foreign sovereign.

34. Insufficient showing has been made that the Republic of Spain is a necessary party to the suit for possession on which the final decree is based.

35. The said suggestion and special appearance constitutes in substance an attempt within the territorial limits of the United States by a foreign sovereign to make a forcible seizure of privately-owned property without the owner's consent and for a foreign sovereign's benefit.

36. The said suggestion and special appearance constitutes an attempt by a foreign sovereign to take tangible property within the United States of a private person domiciled within the United States without making just compensation therefor and without the owner's consent.

37. The said suggestion and special appearance constitutes an attempt by a foreign sovereign to take by force without the owner's consent a vessel whose home port is outside the control and jurisdiction of the Republic of Spain and whose owner is commercially domiciled within the United States.

38. Insufficient showing is made that the five personal respondents named in the suit on which the final decree is [fol. 161] based did not have reasonable and full opportunity to present at the trial of the above entitled cause all of the evidence which it is sought to introduce at this late stage, after final decree has been entered.

39. The said suggestion and special appearance constitute an attempt by a foreign sovereign to take libellant's property within the territorial limits of the United States without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

40. The conduct of said Luis Careaga in connection with the above entitled action as shown by the record in the above entitled action has been such as to estop him from receiving further consideration from the Court.

41. The conduct of said Jesse L. Rosenberg in connection with the above entitled action as shown by the record in the above entitled action has been such as to estop him from receiving further consideration from the Court.

42. The conduct of said Fernando De Los Rios in connection with the above entitled action as shown by the record in the above entitled action has been such as to estop him from receiving further consideration from the Court.

43. It does not appear in proper and sufficient form from said suggestion and special appearance that they are being presented by the Ambassador of the Republic of Spain.

[fol. 162] 44. It does not appear in proper and sufficient form from said suggestion and special appearance that the

Republic of Spain is presenting such suggestion and special appearance.

45. The Ambassador of the Republic of Spain is not shown to be a proper or necessary party to the above entitled action.

46. The Republic of Spain is not shown to be a proper or necessary party to the above entitled action.

47. Insufficient showing has been made that any person in the service of the Republic of Spain was on board of or in possession of the Steamship "Navemar" at the time that vessel was attached under process of the above entitled Court in the above entitled action or otherwise.

48. It does not sufficiently appear that said Jesse L. Rosenberg is a proper party to file such a suggestion and special appearance.

49. It does not appear sufficiently that said Luis Careaga is a proper party to file such a suggestion and special appearance.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 163] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL SUGGESTION

Now comes Fernando de Los Rios, Ambassador of the Republic of Spain, duly accredited to the United States, by Luis Careaga, Acting Consul General of the Republic of Spain, being theretofore duly authorized and appearing specially herein by Jesse L. Rosenberg, by this supplemental affidavit suggests to this Honorable Court further as follows:

First. That supplementing the facts stated in the suggestion annexed to the order to show cause which was signed by Honorable Clarence G. Galston, on the 16th day of December, 1936, the said Luis Careaga in his official authority [fol. 164] and capacity as aforesaid represents to this Hon-

orable Court that, as he has been informed, the libel herein was filed on the 7th day of December, 1936, and was returnable on the 9th day of December, 1936; that immediately upon being informed of this proceeding deponent communicated with Fernando de Los Rios, Ambassador of the Republic of Spain, with respect to the matters involved in the controversy herein; that thereafter as deponent has been informed by the said Ambassador of the Republic of Spain, the said Ambassador communicated by note to the office of the Secretary of the State of the United States of America, pertaining to the controversy involved in this libel proceeding, as is the custom when the property of a foreign state is arrested; that as deponent has been informed by the said Ambassador the said communications with the office of the Secretary of State of the United States of America continued to and including the 15th day of December, 1936; and to the close of the latter day, and it was deemed inadvisable, during such time when such communications were being made as aforesaid, to specially appear in this proceeding.

Second. That in the evening of December 15, 1936, deponent in his official authority and capacity signed the suggestion which is annexed to the aforesaid order to show cause herein, having been authorized to do so by the said Ambassador.

Third. Deponent, therefore, submits that under the circumstances the said Ambassador of the Republic of Spain [fol. 165] and deponent acted with proper dispatch.

Jesse L. Rosenberg, Proctor for Fernando de los Rios, Ambassador as Aforesaid, Appearing Specially. Luis Careaga, Acting Consul General of the Republic of Spain.

Duly sworn to by Luis Careaga. Jurat omitted in printing.

[fol. 166] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A. No. 15,102

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant,

against

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents

Appearances:

Bigham, Englar, Jones & Houston, Esquires, Proctors for Libellant, James W. Ryan, of Counsel.

Jesse L. Rosenberg, Esquire, Proctor for His Excellency, Fernando de los Rios, Ambassador of the Republic of Spain, by Lynch, Hagen & Atkins, Esquires; Horace T. Atkins, Esquire, and Charles W. Hagen, Esquire, of Counsel.

OPINION, GALSTON, D. J., ON FIRST APPLICATION—December 31, 1936

GALSTON, D. J.:

A decree by default but after proof submitted by the libellant, having been entered in this cause on December 14, [fol. 167] 1936, in favor of the libellant directing the delivery of possession of the steamship "Navemar" to the libellant, the Ambassador of the Republic of Spain, by the Acting Consul General of the Republic of Spain, appearing specially, presents a pleading which has been designated a "suggestion," wherein it is set forth that in October, 1936, the Consul General of the Republic of Spain at Rosario, Argentine, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the steamship "Navemar" in the name of the Republic of Spain, under a decree of the Republic of Spain, dated October 10, 1936, whereby the steamship "Navemar" then and there became and has since remained the property of the Government of Spain. It is suggested that by reason thereof the steamship "Navemar" is immune from arrest and not subject to the judicial process of the court. On that

suggestion the libellant was called upon to show cause why the default of the respondents should not be opened and why the Ambassador of Spain should not be permitted to appear specially as claimant of the steamer and why the decree heretofore made should not be set aside and vacated.

Admiralty Rule 28 provides that the court may set aside the default and upon the application of the respondent or claimant admit him to make answer to the libel on such terms as the court may direct.

Though the court is impelled to give a claimant his day in court and equally desirous so far as may be proper of waiving or relaxing the constricting technicalities of practice, nevertheless the broad discretion thus indicated in Ad- [fol. 168] miralty Rule 28 must not be abused. Consequently there should be a substantial showing of a meritorious defense and some explanation too of the reason why the default occurred.

There is a satisfactory explanation given for the latter circumstance. In the supplemental suggestion filed on behalf of the Ambassador of the Republic of Spain it appears that on being informed of the filing of the libel, he communicated with the Secretary of State of the United States concerning the controversy involved in the libel and that pending the exchange of communications it was deemed inadvisable by him to appear in this proceeding.

But a meritorious defense has not been sufficiently set forth.

The suggestion contains the following paragraph:

"Third. The said Luis Careaga in his official authority and capacity aforesaid represents to this Honorable Court that in the month of October, 1936, the Consul General of the Republic of Spain at Rosario, Argentina, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the said Steamship Navemar, in the name of the Republic of Spain under a decree of the Republic of Spain dated the 10th day of October, 1936, whereby the said Steamship Navemar then and there became and at all times since has remained the property of the Government of the Republic of Spain."

There is no allegation in that paragraph nor elsewhere that at the time that the alleged possession of the steam-

[fol. 169] ship "Navemar" was taken by the Consul General of the Republic of Spain located at Rosario, the vessel was devoted to the public use or employed in carrying on the operations of the Spanish Government. Indeed there is no allegation that the vessel was ever at Rosario, nor any as to when and where the Consul General of the Republic of Spain at Rosario took possession of the steamship. There is nothing stated as to the subsequent use of the vessel by the Republic of Spain. There is nothing set forth concerning the nature of the voyage from any port in Argentine to the port of New York at which port the vessel was attached under process of this court. Certainly in its present form and substance the suggestion does not meet the tests which have been clearly defined by the United States Supreme Court.

The following authorities are of interest:

In re Muir, 254 U. S. 522, it appeared that there was a collision between the Gleneden, a British steamship privately owned, and the Giuseppe Verde, an Italian steamship. The Italian owner of the Giuseppi Verde commenced a suit in rem in admiralty against the Gleneden. After the vessel was arrested under the process of the court private counsel for the British Ambassador in Washington presented to the court a suggestion to the effect that the process under which the vessel was arrested should be quashed and jurisdiction declined because "the said vessel is an admiralty transport in the service of the British Government by virtue of a requisition from the Lords' Commissioners of the Admiralty, and is engaged in the [fol. 170] business of the British Government, and under its exclusive direction and control, etc."

The court observed that it was conceded that the Gleneden was not an armed ship of war, that she was not owned by a foreign government but a private corporation, and that in the sense, though she may have been temporarily in the service and under the control of the British Government, the nature and extent of that service and control were left in uncertainty by the proof. The court said:

"Merely to allege that the vessel was in the public service, and under the control of the British Government as an admiralty transport, was not enough."

It may be observed that in the suggestion under consideration in this cause there is not even the allegation that the steamship "Navemar" was in the public service or ever had been.

The Pesaro, 255 U. S. 216, is the case of an Italian steamship which carried a shipment from Genoa to New York, and was sued in rem in admiralty to enforce a claim for damage to part of a cargo. The Italian Ambassador presented a suggestion that the ship was owned by the Italian Government and that at the time of the arrest was in its possession and therefore not subject to the court's process. Mr. Justice Van Devanter for the court said:

"The suggestion was made directly to the court, and not through any official channel of the United States • • • The [fol. 171] terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellant's objection that to be entertained the suggestion should come through the official channels of the United States, was well taken. Re Muir, 254 U. S. 522."

It may be observed that in the case of The Pesaro, the court added:

"What the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in a proper way, we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must."

Thereafter, as reported in Berizzi v. Steamship Pesaro, 271 U. S. 562, it appeared that the Italian Ambassador to the United States appeared and on behalf of the Italian Government specially set forth the vessel at the time of her arrest was owned and possessed by that government, was operated by it in its service and interest and therefore was immune from process of the courts of the United States.

To indicate a meritorious defense herein the Republic of Spain, in accordance with the measure of immunity in-

[fol. 172] dicated in Berizzi v. Pesaro, cited on this motion should show not merely that the vessel was the property of the Republic of Spain but also that it was possessed by that Government and was operated by it in its service and interest. Otherwise immunity cannot be successfully urged to protect a ship engaged in the carriage of merchandise for hire, from seizure by judicial process.

Accordingly, the exceptions of the libellant will be sustained and the motion denied. Permission, however, is granted to the Spanish Ambassador to present another application for leave to appear provided such application conforms to the views hereinbefore set forth.

Settle order on notice.

Clarence G. Galston, U. S. D. J.

[fol. 173] In United States District Court

[Title omitted]

Notice of Entry of Order

Sirs:

You and Each of You are Hereby Notified that an order in the form annexed hereto will be submitted to the above entitled Court for settlement and signature at the office of the Clerk of the above entitled Court, on the fourth floor of the Federal Building, in the Borough of Brooklyn, City and Eastern District of New York, at 2:00 o'clock P. M., on Monday, the 4th day of January, 1937.

Dated, January 2, 1937.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, 99 John Street, New York, N. Y.

[fol. 174] To Jesse L. Rosenberg, Esq., 15 Park Row, New York, N. Y., and Lynch, Hagen & Atkins, Esqs., 111 John Street, New York, N. Y., Proctors for Fernando de los Rios, Ambassador of the Republic of Spain.

[fol. 175] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING EXCEPTIONS—January 4, 1937

The motion, suggestion and special appearance of Fernando de los Rios, Ambassador of the Republic of Spain, and the exceptions thereto of the libellant, and the order to show cause issued by the above entitled Court on the 18th day of December, 1936, on the application of said Fernando de los Rios why the default of the respondents should not be re-opened so as to permit said Fernando [fol. 176] de los Rios to appear specially as claimant of the Steamship "Navemar," and why the final decree entered herein on the 14th day of December, 1936, should not be set aside and vacated and process issued therein vacated, and for other relief having duly come on to be heard, and the said Fernando de los Rios having filed a suggestion dated the 15th day of December, 1936, signed by Luis Careaga, Acting Consul General of the Republic of Spain, by Jesse L. Rosenberg, proctor, on behalf of said Fernando de los Rios, and having also filed a supplemental affidavit dated the 23rd day of December, 1936, also signed by said Luis Careaga, by said Jesse L. Rosenberg, on behalf of said Fernando de los Rios, in support of said motion, suggestion and order to show cause, and the libellant having filed its return to said order to show cause and its exceptions and objections to said order to show cause and to the suggestion and special appearance of said Fernando de los Rios annexed to said order to show cause, and the libellant having submitted in evidence as part of its return the complete transcript of record and exhibits in the above entitled cause; and the Court having read and duly considered the foregoing documents; and the Court having heard Messrs. Jesse L. Rosenberg and Horace T. Atkins, proctors for said Fernando de los Rios, in support of said motion, suggestion and order to show cause, and the Court having heard James W. Ryan, Esquire, of Messrs. Bigham, Englar, Jones & Houston, proctors for libellant, in opposition thereto, and the matter having been submitted to the Court, and due deliberation having been had, and the Court having filed [fol. 177] herein on the 31st day of December, 1936, its

opinion in writing directing the entry of an order sustaining said exceptions of the libellant and denying said motion of said Fernando de los Rios, Ambassador of the Republic of Spain, and other good cause appearing therefor,

It is hereby Ordered, that the said exceptions filed herein by the libellant to said suggestion, special appearance and order to show cause be and the same hereby are sustained; and

It is further Ordered, that the said motion of said Fernando de los Rios, Ambassador of the Republic of Spain, to vacate the final decree and re-open the default of the respondents and to permit said Fernando de los Rios to appear specially as claimant of the said Steamship "Navemar" and to direct the United States Marshal to deliver the Steamship "Navemar" to said Luis Careaga for and in behalf of the Republic of Spain, and for other and further relief, be and the same hereby is denied; and

It is further Ordered, that permission be granted to the said Fernando de los Rios, Ambassador of the Republic of Spain, to present another application for leave to appear, provided such application conforms to the views set forth in said opinion in writing filed by the above entitled Court on the 31st day of December, 1936.

Clarence G. Galston, United States District Judge.

[fol. 178] In United States District Court

[Title omitted]

Order to Show Cause (Second Application)—January 8, 1937

On reading and filing the annexed affidavit of Jesse L. Rosenberg, Proctor for Fernando de los Rios, Ambassador of the Republic of Spain, and the annexed affidavit of Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, N. Y., verified the 6th day of January, 1937, and on all the pleadings [fol. 179] and proceedings heretofore had herein.

Let, Compania Espanola de Navegacion Maritima, S. A., show cause before this Court at a stated term to be held in the United States Court House, Borough of Brooklyn,

City of New York, on the 12th day of January, 1937, at 9:45 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why the default of the respondents should not be reopened, and why Fernando de los Rios, Ambassador of the Republic of Spain, without waiving any favors, privileges, immunities and exemptions to which the said Ambassador of the Republic of Spain may be entitled, should not be permitted to appear as claimant, and why such other and further relief as to this Court may seem just should not be granted.

Service of this order and all the papers annexed thereto shall be sufficient if made upon Compania Espanola de Navegacion Maritima, S. A., or its proctors, Bigham, Englar, Jones & Houston, and on Robins Dry Dock, Inc., or its proctors, Crowell & Rouse, and on Thomas A. McDonald, proctor for Manuel Freire, et al., on or before 9th of January, 1937.

Dated, New York, January 8th, 1937.

Clarence G. Galston, U. S. D. J.

[fol. 180] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LUIS CAREAGA

STATE OF NEW YORK,
County of New York, ss:

Luis Careaga, being first duly sworn, deposes and says:

I am now and at all times herein mentioned have been Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, N. Y., and I make this affidavit in support of the motion of the Ambassador of the Republic of Spain to open the default herein.

The Republic of Spain is now and at all times herein mentioned was a sovereign nation.

There now exists and at all times herein mentioned has existed between the Republic of Spain and the United [fol. 181] States of America, a Treaty of Friendship and General Relations by the terms of which, inter alia, there is granted to the Envoys, Ambassadors, Ministers, Charges

d'affaires, and other diplomatic agents of each other the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored Nation.

That at all times herein mentioned, the steamship Navemar was and now is a Spanish vessel.

That at all times herein mentioned, the steamship Navemar was and now is a Spanish vessel within the meaning of Article XI of the Treaty of 1902 of Friendship and General Relations between Spain and the United States, in that said Steamship Navemar at all times herein mentioned was and now is under the flag of Spain and is furnished with the papers which the laws of Spain require.

That at all times herein mentioned, "Gaceta de Madrid" was and now is the official publication of the Spanish Government.

On the 10th day of October, 1936, a decree relating to the steamship Navemar of the Compania Espanola de Navegacion Maritima, S. A., was duly issued by Manuel Azana, President of the Republic of Spain, by the Minister of Communications and Merchant Marine of the Republic of Spain, as follows:

"Decree

By the same reasons which caused the attachment by the State of several vessels and the destination of these boats to the national public service through the corresponding [fol. 182] decrees of attachment, and in accord with the Cabinet of Ministers and at the request of the Minister of Communications and Merchant Marine, I decree the following:

Art. 1st. The Spanish State attaches the steamship Navemar of the Compania Espanola de Navegacion Maritima, S. A., which will remain as vessel to the service of the State, to be used for its national public service, this vessel will be managed by the Ministry of Communication and Merchant Marine, through the General Bureau of Merchant Marine.

Art. 2. On the Official Registry of vessels and in the Central Registry of the aforesaid General Bureau, it will be stated this attachment and the consequent change of authority, as well as on the documents of the said vessel and on the corresponding Consular registries.

Art. 3. Any insurance policies covering the vessel and cargo which have been duly paid will continue in effect up to the date of their maturity and they will be definitely cancelled if they are made with any foreign companies.

Any new policies of insurance that may be contracted or upon renovation of the existing ones from the date of this decree, will be made with national companies, registered in Spain, according to the rules that may be promulgated by the General Bureau of Merchant Marine.

[fol. 183] Art. 4. The Spanish State takes over all lawful credits and obligations concerning the attached vessel. The final decision of pending claims or any that may arise by consequence of operations or maritime needs of such vessel will fall exclusively under the jurisdiction of the Spanish Courts.

Art. 5. The Minister of Communications requests that the General Bureau of Merchant Marine will ask of the Ministers of Finance and Justice, the necessary and effective measures to secure with the property of the Compania Espanola de Navegacion Maritima, S. A., or of the individuals who will be determined by their holdings in the Company owner of the seized vessel, the fulfilment of any maritime obligations contracted in relation to this ship prior to the date of this decree.

Art. 6. It is hereby declared nulled and without any value whatsoever any simulated maritime debts or sales or change of flag, to be made in a foreign country or in the benefit of subjects or foreign companies, by the Company owner of the said vessel, either in their own name or by their account, as well as any cession or transference of the credits, monies or any other valuables in favor of foreign persons with residence in a foreign country.

Art. 7. The General Bureau of Merchant Marine is commissioned to propose or resolve, according to the cases, [fol. 184] whatever may be necessary in relation to the said vessel, its destination and its legal or international condition.

Art. 8. The Government will in due time give account of this Decree to the Congress and it will be in force as a Law of the country from the date to its insertion and publication in the "Gaceta de Madrid."

Given in Madrid, the tenth of October of the year nineteen hundred and thirty-six. Signed: Manual Azana.—Minister of Communications and Merchant Marine: Signed: Bernardo Giner de los Rios."

A certificate of Don Enrique Carlos de la Casa, Minister Counselor of the Spanish Embassy in Washington, District of Columbia, United States of America, in charge of the Consular Affairs of the Embassy, is in possession of deponent and will be produced in Court as may be required, whereby the said Don Enrique Carlos de la Casa certifies that the aforesaid decree of the President of the Republic of Spain appeared in the official publication of the Spanish Government "Gaceta de Madrid" under date of October 11, 1936. To the certificate of said Don Enrique Carlos de la Casa is attached a certificate of Hon. R. Walton Moore, Acting Secretary of State, certifying that Senor Dr. Don Enrique Carlos de la Casa, was at the time of signing said certificate Counselor of the Embassy of Spain at Washington.

A literal translation into English of the documents mentioned in the preceding paragraph certified to by Enrique Carlos de la Casa, having annexed thereto the certificate of [fol. 185] Hon. R. Walton Moore in like manner as is described in the preceding paragraph, is also in the possession of deponent and will be produced in Court as may be be required.

That on the 25th day of November, 1936, the said steamship Navemar arrived in the Port of New York under the command of her Master, Manuel Martinez, acting for and in behalf of the Republic of Spain under the direction of the Ministry of Communications and Merchant Marine, through the General Bureau of Merchant Marine. Thereafter and on the 25th day of November, 1936, the said Manuel Martinez, as Master of the said steamship Navemar, in his capacity as aforesaid, duly deposited the ship's roll with your deponent and said ship's roll is now in deponent's possession.

It appears by the said ship's roll that the Navemar arrived at Buenos Aires, Argentina, on the 9th day of October, 1936; that the said vessel departed on October 16, 1936, for Rosario, Argentina; that the said vessel arrived at Rosario, Argentina, on October 18, 1936; that the said vessel returned to Buenos Aires, Argentina, arriving there

on October 26, 1936, from which Port she sailed for New York on the 28th day of October, 1936. It further appears by the said ship's roll that at Rosario, Argentina, on the 26th day of October, 1936, Antonio I. Serrano, Spanish Consul in said Port of Rosario, Argentina, made a hand written endorsement on the ship's roll, which literally translated, reads as follows:

"Through a cable dated 26 of the inst month from the [fol. 186] Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936."

Furthermore, your deponent is informed and believes that while the said steamship was at Buenos Aires, Argentina, on the 28th day of October, 1936, Amador Sanchez, Acting Consul General in said Port of Buenos Aires, Argentina, made an endorsement on the ship's register reading as follows:

"Through a cable dated October 15, 1936, to the Spanish Embassy in this Capitol, his Excellency the Minister of State notifies that this vessel has become the property of the Spanish Government through a decree of attachment published in the Official Gazette dated the 11th of the instant month."

Your deponent is informed and believes that the sailings of the Navemar after October 15, 1936, as related above, were made at the direction and under the control of the representatives of the Spanish Republic.

Upon the arrival of the said steamship Navemar in the Port of New York, deponent acting upon instructions from the Ambassador of the Republic of Spain, Fernando de los Rios, instructed Manuel Martinez, then Master of the said steamship Navemar, that the said Master should await and abide further instructions from deponent as regards any further use of the said steamship Navemar.

On November 28, 1936, deponent instructed Manuel Martinez, the then Master of the said steamship Navemar, that [fol. 187] the said Master should present to deponent as soon as possible a detailed account of the expenses of the Navemar such as salaries, food, and so forth, as well as a bill for the work and repairs of minor importance that the vessel might undergo.

Thereafter the said Manual Martinez, personally, delivered to deponent an account of the crew of the boat and further delivered a statement setting forth certain contemplated repairs to be performed upon the vessel.

Thereafter, deponent in behalf of the Republic of Spain made partial payments on account of salaries and wages of the said master and crew of the steamship Navemar and manned, victualed and supplied the vessel.

Thereafter, deponent, in furtherance of said decree of October 10, 1936, relieved Manuel Martinez, from his command as Master of the Navemar and on the 7th day of December, 1936, appointed Tomas Pascual, as Master thereof to act as Master.

That at all times herein stated, under the laws of the Republic of Spain, the said steamship Navemar has been attached to the Republic of Spain pursuant to the said decree published October 11, 1936, as aforesaid, and subject to use by the Republic of Spain for its national public service as provided by said decree.

That said vessel was held in New York by representatives of the Spanish Government for use by the Spanish Government to carry cargo from New York to Spain for the purposes of the Spanish Government, it being the intention of said Government to use said vessel for such public purpose; [fol. 188] that said vessel would have been so used but for the interference with such use by the filing of the libel herein.

By virtue of the aforesaid decree of the President of the Republic of Spain and its insertion and publication in the "Gaceta de Madrid," the said steamship Navemar thenceforth became attached by the Republic of Spain and subject to the service of the Republic of Spain for use in its national public service under the management of the Ministry of Communications and Merchant Marine, through the General Bureau of Merchant Marine of the Republic of Spain.

Notwithstanding the premises, Compania Espanola de Navegacion Maritima, S. A., alleged to be a corporation duly organized and existing under the laws of the Republic of Spain, filed its libel in the United States District Court for the Eastern District of New York, verified by Marcelino Garcia, as President of libellant corporation and as a citizen of the Republic of Spain, against the Spanish Steamship Navemar and against certain respondents, citizens of

the Republic of Spain, in which libel Compania Espanola de Navegacion Maritima, S. A., alleged ownership of the said steamship Navemar and that as such, Compania Espanola de Navegacion Maritima, S. A., was and is entitled to the possession of the said steamship. In said libel, it is further alleged that libellant is a corporation duly organized and existing under the laws of the Republic of Spain and the sole person entitled to the possession of the vessel; that in the month of October, 1936, while the master, officers and crew employed by libellant were on board the said steamship, the members of the crew of said steamship [fol. 189] wrongfully, unlawfully and forcibly deprived libellant of possession of the steamship and have since continuously withheld her from libellant by unlawfully and forcibly seizing, asserting and exercising exclusive control over the steamship Navemar.

The said libel of Compania Espanola de Navegacion Maritima, S. A., against the said steamship Navemar was returned on the 9th day of December, 1936, and on December 14, 1936, no answer or general appearance having been filed by any of the respondents or by anyone claiming an interest in the said steamship Navemar, the Hon. Clarence G. Galston, United States District Judge of the United States District Court for the Eastern District of New York, entered the following decree in the above entitled cause:

"This cause having come on regularly to be heard on the pleadings and proofs herein, and having been duly submitted to the Court, and due deliberation having been had, and it appearing that the process on the libel herein was duly served on each of the respondents, and that the process has been duly served in rem on the Spanish Steamship 'Navemar,' and it appearing that no answer or general appearance has been filed by any of the respondents or by anyone claiming an interest in said Steamship, 'Navemar,' and proofs having been taken in open Court establishing the ownership and right to possession of the Spanish Steamship 'Navemar' as being in the libellant, and good cause appearing therefor, it is hereby

[fol. 190] Ordered, Adjudged and Decreed that the libellant is entitled to the possession of the Spanish Steamship 'Navemar,' and it is

Further, Ordered, Adjudged and Decreed, that the United States Marshal for the Eastern District of New

York be and he hereby is directed to deliver possession of said Spanish Steamship 'Navemar' to the libellant; and it is

Further, Ordered, Adjudged and Decreed, that any and all persons now on board the Spanish Steamship 'Navemar' who claim any interest in her adverse to the libellant or whom the libellant desires to have removed from the said Spanish Steamship 'Navemar' be and they hereby are directed to leave the Spanish Steamship 'Navemar.' "

Deponent says that immediately upon being informed of the libel proceedings instituted by Compania Espanola de Navegacion Maritima, S. A., against the said steamship Navemar, he communicated with Fernando de los Rios, Ambassador of the Republic of Spain, duly accredited as such to the Government of the United States of America, in connection with the matters involved herein. That thereupon, the said Amabassador, considering the character of the matter diplomatic rather than judicial, communicated with the Secretary of State of the United States concerning the controversy in the libel of Compania Espanola de Navegacion Maritima, S. A., and that pending the exchange [fol. 191] of communications it was considered inadvisable by the Ambassador to appear in this proceeding.

Negotiations through diplomatic channels continued until December 15, 1936.

At all times mentioned in the said libel of Compania Espanola de Navegacion Maritima, S. A., the said steamship Navemar was in the possession of the Republic of Spain and subject to its direction and control for use in its national public service as distinguished from any possession, direction, control or use of any individual citizen of the Republic of Spain, private or official, and that said vessel was destined for and intended to be used for such public purpose.

Deponent respectfully represents that the said steamship Navemar at all times herein mentioned was not subject to being sued or proceeded against without the consent of the Republic of Spain; that at all times herein mentioned, the said steamship, under the laws of Spain, was under the absolute control of the Republic of Spain; that the Republic of Spain has never consented that the said steamship Navemar be proceeded against judicially by libel or otherwise and has never consented that the said steamship

Navemar be seized or proceeded against by judicial process anywhere, or that the Republic of Spain be sued in respect thereto. Accordingly, deponent says that no action lies against the said steamship Navemar in favor of the libellant as a result of any or all of the events set forth in the said libel and that the steamship Navemar is immune from the process of this Honorable Court.

Wherefore, deponent respectfully requests that the default of respondents be reopened, and that the said decree [fol. 192] entered herein on the 14th day of December, 1936, be set aside and vacated, and that Fernando de los Rios, Ambassador of the Republic of Spain, duly accredited to the United States of America, in behalf of the Republic of Spain and without waiving any favors, privileges, immunities and exemptions to which the said Ambassador or the Republic of Spain may be entitled, be permitted to appear herein as claimant of the said steamship Navemar and for such other and further relief as to this Court may seem just in the premises.

Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, N. Y.

Sworn to before me this 6th day of January, 1937. S. Olenick, Notary Public. N. Y. Co. Clk's #154. Commission expires March 30, 1938. (Notarial Seal.)

[fol. 193] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JESSE L. ROSENBERG

STATE OF NEW YORK,
County of New York, ss:

Jesse L. Rosenberg, being duly sworn, deposes and says: I am the proctor for Fernando de los Rios, Ambassador of the Government of the Republic of Spain, duly accredited to the United States of America.

Deponent respectfully requests that an order to show cause be granted herein returnable on the —day of January, 1937. Deponent seeks this order to show cause in order

to have an immediate determination of the motion to open the default herein.

No previous application for the relief herein has been requested, except that a previous application to open the [fol. 194] default was made herein on the 16th day of December, 1936, and thereafter this Court sustained the exceptions of the libellant to said motion and permitted the Spanish Ambassador to present another application for leave to appear.

Jesse L. Rosenberg, Appearing Specially.

Sworn to before me this 6th day of January, 1937. S. Olenick, Notary Public. Kings Co. Clerk's No. 43. New York Co. Clerk's No. 154. Commission expires March 30, 1938. (Notarial Seal.)

[fol. 195] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE

The libellant, Compania Espanola de Navegacion, Maritima, S. A., as and for its return to the order to show cause dated the 8th day of January, 1937, returnable on the 12th day of January, 1937, obtained on behalf of Fernando de los Rios, Ambassador of the Republic of Spain, or application for leave to appear, respectfully alleges and shows:

1. Libellant submits and files herewith an affidavit, with accompanying exhibits, of Manuel Martinez, Diaz, Master of the Spanish Steamship "Navemar"; and an affidavit of Manuel Noriega, interpreter.

2. Libellant submits and files herewith its exceptions and objections to said order to show cause and to the affidavits of Luis Careaga and Jesse L. Rosenberg annexed to said order to show cause and filed herein.

[fol. 196] 3. Without waiving any of said exceptions or objections, libellant submits in evidence as part of its return the complete Transcript of the Record and Exhibits in the above-entitled cause.

Wherefore, libellant prays that said order to show cause be vacated and set aside and that said exceptions and objections to it be sustained.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIONS AND OBJECTIONS TO ORDER TO SHOW CAUSE

The libellant, Compania Espanola de Navegacion, hereby excepts and objects to the application for leave to appear or [fol. 197] order to show cause, dated the 8th day of January, 1937, and returnable on the 12th day of January, 1937, obtained on behalf of Fernando de los Rios, Ambassador of the Republic of Spain as follows:

1. The application presented by the Spanish Ambassador for leave to appear does not conform to the views set forth in the written opinion filed by the above entitled court on the 31st day of December, 1936, and in the order entered thereon by the above entitled court on the 4th day of January, 1937.

2. There has been no substantial or sufficient showing of a meritorious defense.

3. There has been no sufficient showing that at the time that the alleged possession of the Steamship "Navemar" was taken by the Consul General of the Republic of Spain located at Rosario the vessel was devoted to the public use or employed in carrying on the operations of the Spanish Government.

3a. There has been no sufficient showing that the Steamship "Navemar" was at Rosario at the time that the alleged possession of her was taken by the Consul General of the Republic of Spain located at Rosario, or at any time since then.

4. There has been no sufficient showing as to when and where the Consul General of the Republic of Spain at Rosario took possession of the Steamship "Navemar."

[fol. 198] 5. There has been no sufficient showing as to the subsequent use of the vessel by the Republic of Spain after the alleged possession of the "Navemar" was taken by the Consul General of the Republic of Spain located at Rosario.

6. There has been no sufficient showing concerning the nature of the voyage from any port in Argentine to the port of New York, at which port the Steamship "Navemar" was attached under process of this Court.

7. There has been no sufficient showing or certainty of proof as to the nature and extent of the service and control by the Republic of Spain of the Steamship "Navemar."

8. There has been no sufficient showing that the Steamship "Navemar" was in the public service of the Republic of Spain at the time she was attached under process of this court, or that she ever had been in such public service.

9. There has been no sufficient showing that the Steamship "Navemar" has ever been owned by the Republic of Spain.

10. There has been no sufficient showing that the Steamship "Navemar" was being operated by the Republic of Spain in its service and interest at the time she was attached under process of this court.

11. There has been no sufficient showing that the Steamship "Navemar" has ever been the property of the Republic of Spain.

[fol. 199] 12. There has been no sufficient showing that the Steamship "Navemar" has ever been operated by the Republic of Spain in its service and interest.

13. Insufficient evidence has been presented or showing made to warrant the court in drawing the inference that there is any reasonable ground for believing that the final decree entered herein is in any material respect incorrect, or that substantial evidence exists of any fact which is material and which would cause a change in said final decree.

14. Insufficient showing has been made to warrant the court in inferring that at any time since October, 1936, any one representing, or in the service of the Republic of Spain, has been in possession of the Steamship "Navemar."

15. Insufficient showing has been made to warrant the court in inferring that the Steamship "Navemar" is owned by the Republic of Spain.

16. There is no affidavit or showing by any person who has personal knowledge of any fact which would materially affect said final decree.

17. There is no affidavit or showing by any person who has information and belief of any fact which would materially affect said final decree.

18. Insufficient showing has been made that the Steamship "Navemar," at the time the decree of the Republic of [fol. 200] Spain dated the 10th day of October, 1936, was issued, or at any time since, has been within Spain or her possessions or at any other place at which said decree might have extra-territorial effect.

19. Insufficient showing has been made that the Steamship "Navemar" was in possession of the Republic of Spain at the time the above-entitled Court took possession of her through the United States Marshal for the Eastern District of New York.

20. Insufficient showing has been made that the Steamship "Navemar" was in possession of the Republic of Spain at the time the process was served under the libel in the above-entitled action.

21. Insufficient showing has been made that the ownership or property of the Steamship "Navemar" has at any time been in the Republic of Spain.

22. Insufficient showing has been made that said Luis Careaga, Acting Spanish Consul General at New York City, has ever been in possession of the Steamship "Navemar."

23. Insufficient showing has been made that any agent of the Republic of Spain has ever been in possession of the Steamship "Navemar."

24. Insufficient showing has been made that any of the master, officers, or crew of the Steamship "Navemar" was [fol. 201] ever discharged from the shipping articles or contract of employment with libellant at any time before the above-entitled Court took possession of said Steamship through the United States Marshal for the Eastern District of New York.

25. The statements in the affidavits of Luis Careaga and Jessie L. Rosenberg annexed to said application for leave to appear or order to show cause are refuted by the Steamship "Navemar's" own ship's documents or official credentials, which are already in evidence in the above-entitled action, and part of which were produced by said Luis Careaga himself at the trial of the above-entitled action. If any documents or credentials to the contrary existed he would obviously have produced them or mentioned them at that time.

26. That said application for leave to appear or order to show cause is an attempt to have this Court give extra-territorial effect within the United States to a decree or law which was enacted in Spain and which affected only vessels which were then within Spanish territorial limits or which thereafter came within Spanish territorial limits, and there is no showing that the Steamship "Navemar" at the time the decree or law was enacted, or at any time since, has been within Spanish territorial limits.

27. The said application for leave to appear or order to show cause is an attempt to have this Court enforce as to a vessel which is in the possession of her owner who is com- [fol. 202] mercially domiciled within the United States a confiscatory decree which was enacted in a foreign country and which is applicable only to vessels or property within that foreign country.

28. Insufficient showing has been made that the decree of the Republic of Spain dated the 10th day of October, 1936, was in accordance with the Constitution and laws of Spain, or would have any legal effect of transfer of title, property, or possession even if the Steamship "Navemar" had been within Spanish territorial limits at the time the decree was issued, or thereafter.

29. The said application for leave to appear or order to show cause is improper and insufficient in that they constitute an attempt by an Ambassador, who is a diplomatic representative, to appear and act through an Acting Consul General, who is a commercial representative.

30. There has been no sufficient showing that Luis Careaga is a diplomatic representative, listed as such with the Secretary of State of the United States.

31. There has been no sufficient showing that Luis Careaga has been properly authorized by the Republic of Spain to present said application for leave to appear or said order to show cause.

32. The said application for leave to appear or order to [fol. 203] show cause, is improper and insufficient in that it constitutes an attempt by an Ambassador, who is a diplomatic representative of a foreign sovereign, to appear and act through a private citizen of the United States, Jesse L. Rosenberg, who is an attorney at law and a member of the Bar and an officer of the above-entitled Court and certainly subject to its general jurisdiction.

33. The said application for leave to appear or order to show cause is improper and insufficient in that it constitutes an attempt by the diplomatic representative of a foreign sovereign to exercise a sovereign prerogative within the territorial limits of the United States by claiming immunity and freedom from the above-entitled Court's jurisdiction and process of a privately-owned merchant vessel which is within the United States and whose private owner is domiciled in the United States and which has never been in the possession of the foreign sovereign.

34. Insufficient showing has been made that the Republic of Spain is a necessary party to the suit for possession on which the final decree is based.

35. The said application for leave to appear or order to show cause constitutes in substance an attempt within the territorial limits of the United States by a foreign sovereign to make a forcible seizure of privately-owned property without the owner's consent and for a foreign sovereign's benefit.

[fol. 204] 36. The said application for leave to appear or order to show cause constitutes an attempt by a foreign sovereign to take tangible property within the United States of a private person domiciled within the United States without making just compensation therefor and without the owner's consent.

37. The said application for leave to appear or order to show cause constitutes an attempt by a foreign sovereign to take by force without the owner's consent a vessel whose home port is outside the control and jurisdiction of the

Republic of Spain and whose owner is commercially domiciled within the United States.

38. Insufficient showing is made that the five personal respondents named in the suit on which the final decree is based did not have reasonable and full opportunity to present at the trial of the above-entitled cause all of the evidence which it is sought to introduce at this late stage after final decree has been entered.

39. The said application for leave to appear or order to show cause constitutes an attempt by a foreign sovereign to take libellant's property within the territorial limits of the United States without due process of law and in violation of the Fifth Amendment to the Constitution of the United States.

40. The conduct of said Luis Careaga in connection with the above-entitled action as shown by the record in the [fol. 205] above-entitled action has been such as to estop him from receiving further consideration from the Court.

41. The conduct of said Jesse L. Rosenberg in connection with the above-entitled action as shown by the record in the above-entitled action has been such as to estop him from receiving further consideration from the Court.

42. The conduct of said Fernando De Los Rios in connection with the above-entitled action as shown by the record in the above-entitled action has been such as to estop him from receiving further consideration from the Court.

43. It does not appear in proper and sufficient form from said application for leave to appear or order to show cause that it is being presented by the Ambassador of the Republic of Spain.

44. It does not appear in proper and sufficient form from said application for leave to appear or order to show cause that the Republic of Spain is presenting such suggestion and special appearance.

45. The Ambassador of the Republic of Spain is not shown to be a proper or necessary party to the above-entitled action.

46. The Republic of Spain is not shown to be a proper or necessary party to the above-entitled action.

47. Insufficient showing has been made that any person in the service of the Republic of Spain was on board of or [fol. 206] in possession of the Steamship "Navemar" at the time that vessel was attached under process of the above-entitled Court in the above-entitled action or otherwise.

48. It does not sufficiently appear that said Jesse L. Rosenberg is a proper party to file such application for leave to appear or order to show cause.

49. It does not sufficiently appear that said Luis Careaga is a proper party to file such application for leave to appear or order to show cause.

50. Insufficient showing has been made to warrant the Court in inferring that any substantial evidence is now available to said Fernando de los Rios or to Luis Careaga or to Jesse L. Rosenberg, which was not available to said persons during the trial of this cause and before the final decree was entered.

51. Insufficient showing has been made to warrant the Court in inferring that said Fernando de los Rios did not have knowledge before the final decree was entered that this cause was pending and was on trial and did not have reasonable opportunity to appear and present at said trial any evidence that he now seeks to introduce.

52. The numerous contradictions between the affidavit now filed by Luis Careaga, annexed to said order to show [fol. 207] cause, and the other affidavit filed by said Luis Careaga annexed to the first order to show cause, issued on December 18, 1936, show that no meritorious defense exists and that no further application for leave to appear should be entertained on behalf of the Republic of Spain or of Fernando de los Rios, Ambassador of the Republic of Spain.

53. There has been no sufficient showing that Manuel Martinez, Master of the Steamship "Navemar," was acting for or in behalf of the Republic of Spain, or under the direction of the Ministry of Communications and Merchant Marine, or through the General Bureau of Merchant Marine on the 25th day of November, 1936, when the Steamship "Navemar" arrived in the Port of New York under command of said master.

54. There has been no sufficient showing that Manuel Martinez, Master of the Steamship "Navemar" has ever acted for or in behalf of the Republic of Spain.

55. There has been no sufficient showing that Manuel Martinez, Master of the Steamship "Navemar," deposited the ship's roll of the "Navemar" with said Luis Careaga at New York City in any capacity, other than as master acting on behalf of the Compania Espanola de Navegacion Maritima, S. A., the owner of the said Steamship.

56. There has been no sufficient showing that the sailings of the Steamship "Navemar" after October 15, 1936, were [fol. 208] made at the direction or control of the representatives of the Spanish Republic.

57. There has been no sufficient showing that upon the arrival of the Steamship "Navemar" in the Port of New York, said Luis Careaga, acting upon instructions from the Ambassador of the Republic of Spain, or othewise, instructed Manuel Martinez, then Master of the Steamship "Navemar" that said Master should await or abide further instructions from said Luis Careaga as regards any further use of the Steamship "Navemar."

58. There has been no sufficient showing that said Luis Careaga, in behalf of the Republic of Spain, made partial payment on account of salaries or wages of the said master or crew of the Steamship "Navemar."

59. There has been no sufficient showing that said Luis Careaga, in behalf of the Republic of Spain, at any time manned the Steamship "Navemar."

60. There has been no sufficient showing that said Luis Careaga, on behalf of the Republic of Spain, at any time victualed the Steamship "Navemar."

61. There has been no sufficient showing that said Luis Careaga, on behalf of the Republic of Spain, at any time supplied the Steamship "Navemar."

62. There has been no sufficient showing that said Luis Careaga, in furtherance of said decree of October 10, 1936, [fol. 209] or otherwise, relieved Manuel Martinez from his command as Master of the Steamship "Navemar," or was ever authorized to do so or has at any time done so.

63. There has been no sufficient showing that said Luis Careaga, in furtherance of said decree of October 10, 1936, or otherwise, appointed Tomas Pascual as Master of the Steamship "Navemar" to act as Master on the 7th day of December, 1936, or at any other time, or that Tomas Pascual ever presented any credentials to any person in charge of said Steamship "Navemar" at any time, or ever took possession of her or attempted to take possession of her on behalf of the Republic of Spain, or any other person.

64. There has been no sufficient showing that at the time process was issued against the "Navemar" by this court, the "Navemar" was attached to the Republic of Spain, pursuant to said decree published October 11, 1936, or otherwise.

65. There has been no sufficient showing that the Steamship "Navemar" has at any time been used or subject to use by the Republic of Spain for its national public service.

66. There has been no sufficient showing that the Steamship "Navemar" has ever been held in New York by representatives of the Spanish Government.

67. There has been no sufficient showing that the Steamship "Navemar" has ever been held in New York by repre- [fol. 210] sentatives of the Spanish Government for use by the Spanish Government to carry cargo from New York to Spain, or for any other purpose.

68. There has been no sufficient showing that it has ever been the intention of the Government of the Republic of Spain to use the Steamship "Navemar" for any public purpose.

69. There has been no sufficient showing that the Steamship "Navemar" would have been used by the Republic of Spain for any public purpose but for the interference with such use by the filing of the libel herein.

70. There has been no sufficient showing that by virtue of the said decree of the President of the Republic of Spain and/or its insertion and/or publication in the "Gaceta De Madrid," the Steamship "Navemar" thenceforth or at any other time became attached by the Republic of Spain or subject to the service of the Republic of Spain for use in its national public service.

71. There has been no sufficient showing that negotiations by the Spanish Ambassador with the Secretary of State of the United States through diplomatic channels continued until December 15, 1936, in view of the formal admission in open court on the record of this court by counsel for said Ambassador of the Republic of Spain and by said Luis Careaga that the Secretary of State finally terminated in writing said negotiations by letter delivered to said Ambassador of the Republic of Spain on December 11, 1936.

[fol. 211] 72. There has been no sufficient showing that at the times mentioned in the libel in the above-entitled action the Steamship "Navemar" was in the possession of the Republic of Spain or subject to its direction and control for use in its national public service.

73. There has been no sufficient showing that the Steamship "Navemar" was destined for or intended to be used for any public purpose of the Republic of Spain.

74. There has been no sufficient showing that the Steamship "Navemar" at the times mentioned in the affidavit of said Luis Careaga annexed to the order to show cause, or at the time process of this court was issued against her, was under the control, absolute or otherwise, of the Republic of Spain.

75. There has been no sufficient showing that the Republic of Spain has ever had any interest as owner or possessor of the Steamship "Navemar."

Wherefore, libellant prays that said order to show cause be vacated and set aside and that said application of Fernando de los Rios, Ambassador of the Republic of Spain for leave to appear be denied and that the exceptions and objections of libellant to said order to show cause and to said application be sustained.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 212] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MANUEL MARTINEZ DIAZ

Manuel Martinez Diaz, being first duly sworn, deposes and says:

I am and have been continuously for the last three years the master of the Spanish Steamship "Navemar," duly

appointed by her owner and operator, the Compania Espanola de Navegacion Maritima, S. A., whose President and Director is Mr. Marcelino Garcia, of No. 17 Battery Place, New York City.

There has been translated to me in full in the Spanish language by Mr. Manuel Noriega, the interpreter, the affi- [fol. 213] davit of Luis Careaga, Acting Consul General of Spain in New York, dated the 6th day of January, 1937, consisting of ten pages and annexed to an order to show cause issued by the above entitled court.

Neither the Spanish Consul at Rosario nor the Spanish Consul General at Buenos Aires ever took possession of the "Navemar" or informed me that they wished to take possession or had any instructions to do so. The Spanish Consul at Rosario never gave me any instructions of any sort respecting the "Navemar." The "Navemar" was not in Rosario on October 26, 1936.

It is the usual practice of Spanish shipmasters of privately-owned merchant vessels and of all shipmasters of all countries, as I understand it, to deposit the ship's roll with the Consul on arriving at a port and then receive it back again just before sailing, the ship's roll being merely a record of the arrivals and sailings of the vessel or entrances and clearances at each port, together with a record of the kind of cargo carried and passengers, if any, carried, and the signing on or enrollment of each member of the crew and all their discharges, these latter events being required to be entered by the Consul (if in a foreign port) or by the Marine Authority (if in a Spanish port) on the ship's roll on the demand of the master of the vessel. The ship's roll is not a document or title of ownership or possession of the vessel, but is merely a record, as aforesaid. The document of title or possession of a Spanish vessel or, as I understand it, of any other vessel, is the bill of sale which is at all times in the owner's possession, and a copy of which is recorded [fol. 214] in the public records in the home port of the vessel. The ship's register of a vessel shows the flag or nationality of the vessel, as determined by the place where her home port is situated. The ship's register is not a document of title or possession of a Spanish vessel or, as I understand it, of any other vessel.

In ordinary course of business as master of the "Navemar" for her owner, Compania Espanola de Navegacion

Maritima, S. A., I deposited the ship's roll with the Spanish Consul at Rosario on arrival there and in ordinary course it would have been returned to me just before sailing from Rosario. However, as the Consul's office was closed for the day, I was advised by the shippers of the linseed cargo at Rosario that although all the linseed intended to be shipped had not yet been loaded it was imperatively necessary that the "Navemar" sail at once because the height of water was going down in the river and if she did not sail immediately she would be delayed for a long period. The shippers said they would make arrangements to deliver the rest of the linseed cargo to the "Navemar" when she arrived at Buenos Aires and the representative of the Linea Sud Americana, Inc., there informed me that he would call at the Consul's office at Rosario at its opening the next morning and would obtain the ship's roll and would send it by mail to me in care of the Linea Sud Americana, Inc., at Buenos Aires. Accordingly, the "Navemar" sailed immediately at 5:00 P. M. on October 23, 1936, without her ship's roll.

Before the ship had gone to Rosario to load the linseed cargo I had called at the office of the Spanish Consul General [fol. 215] at Buenos Aires and after the loss conferred with the Spanish Ambassador at Buenos Aires. He told me that neither he nor the Ambassador had any instructions or orders whatever with respect to the "Navemar" after I had told him about the cable that had come to me while I was on board the "Navemar" at Buenos Aires.

Shortly after the "Navemar's" return to Buenos Aires, arriving there at 2:00 P. M. on October 24th from Rosario, I called at the office of the agent of the Linea Sud Americana, Inc., at Buenos Aires and discovered that the ship's roll had not yet arrived from Rosario. The agent of the Linea Sud Americana at Buenos Aires then telephoned long distance to the agent of the Linea Sud Americana, Inc., at Rosario, asking whether the ship's roll had been mailed as promised, and was informed that the Spanish Consul at Rosario had declined to deliver the ship's roll to the agent of the Linea Sud Americana at Rosario, saying that it would be delivered only to the master of the "Navemar," and that the master would have to come back to Rosario to get it in person. I then went immediately to the Spanish Consul General at Buenos Aires and told him the circumstances and he then telephoned by long distance to the Spanish Consul at Rosario and instructed him to send the ship's roll of the

"Navemar" to him. I then left the office of the Spanish Consul General at Buenos Aires. On October 28, 1936, the day before the "Navemar" sailed from Buenos Aires, the Spanish Consul General at Buenos Aires left a message at the office of the agent of the Linea Sud Americana, Inc., at Buenos Aires for me, directing me that when I should come [fol. 216] over to the Spanish Consul General's office to have the departure or clearance entered on the ship's roll I should bring with me the ship's register of the "Navemar," which I did, and deposited it with the Spanish Consul General. The Spanish Consul General at Buenos Aires then shortly afterwards returned to me the ship's register and the ship's roll (which he had received from the Consul General at Rosario) and I noticed the endorsements that had been written on them, one on the ship's roll by the Consul at Rosario and one on the ship's register by the Spanish Consul General at Buenos Aires. The Spanish Consul General at Buenos Aires told me, however, that he had no instructions whatever with respect to the "'Navemar" and that she should continue her voyage. He said nothing about wishing to take possession or ever intending to take possession. The Spanish Consul General at Buenos Aires merely told me that I should notify Madrid that I was sailing, which I accordingly did by writing out and sending the following radiogram to Madrid personally on October 29, 1936, the day on which the "Navemar" sailed from Buenos Aires for New York:

"29th de Octubro de 1936.

a los 1600 horas GMT.

Director General Marina Mercante Madrid

Autorizado por Consul General salimos par New York saludale.

Captain Navemar."

[fol. 217] That radiogram reads in English as follows:

"29th October 1936.

At 4 P. M. GMT.

General Director of Merchant Marine, Madrid

Authorized by Consul General we sail for New York Greetings.

Signed Master, Navemar."

On October 28, 1936, the usual clearance of the "Navemar" for New York was obtained from the Argentine Government Customs House officers in Buenos Aires, and on arrival at New York this was deposited by me with the United States Collector of the Port in the Customs House in New York City.

The "Navemar" is an ordinary commercial type freight steamer of 9,000 tons cargo carrying capacity.

The "Navemar," carrying a general cargo for various private shippers as a common carrier for hire, sailed from New York on September 11, 1936. After stopping at St. Thomas, Virgin Islands, on September 17th, and at Rio de Janeiro on October 2nd, and at Montevideo on October 7th, she arrived at Buenos Aires at 4:00 A. M. on October 9, 1936, and came to anchor, and later that day proceeded to a pier in Buenos Aires, mooring alongside at 6:00 P. M. on October 9th. She sailed from Buenos Aires at 3:00 P. M. on October 16th. She arrived at Rosario at 11:00 P. M. [fol. 218] on October 17th. She sailed from Rosario at 5:00 P. M. on October 23rd, after having loaded at Rosario 5,800 tons of linseed in bulk shipped by private shippers to Archer-Daniels Company, a corporation of the United States, to be delivered at Edgewater, New Jersey. She arrived at Buenos Aires at 2:00 P. M. on October 24, 1936, and loaded some more linseed for the same consignee and also 2,200 tons of general cargo shipped by various other private shippers on the "Navemar" as a common carrier for hire, to various other private consignees in the port of New York. She sailed from Buenos Aires at 10:30 A. M. on October 29th and arrived at New York at 7:00 A. M. on November 25, 1936, and came to anchor at Quarantine. She left Quarantine at 4:00 P. M. on November 25th and arrived at the State Barge Canal pier, foot of Columbia Street, Brooklyn, New York, at 5:00 P. M. on November 25th, and on November 27th began to discharge at that pier her general cargo and completed the discharging of her general cargo there on Saturday, November 28, 1936. She still had her linseed cargo on board and left that pier in Brooklyn at 8:00 A. M. on November 30th and arrived at the Archer-Daniels pier at Edgewater, New Jersey, at 11:00 A. M. on November 30, 1936. She began discharging her linseed cargo there the same day and completed discharging the linseed cargo at 6:00 P. M. on December 1, 1936. This

completed the discharging of all cargo on board. Freight was earned and was payable to Linea Sud Americana, Inc., on each and every shipment of the general cargo and on the linseed cargo for the carriage on the "Navemar" from Rosario or Buenos Aires to New York and before any con-
[fol. 219] signee in New York or in Edgewater could take delivery of the cargo each consignee was required to pay that freight to Linea Sud Americana, Inc., and obtain a delivery order and present it at the pier. The Linea Sud Americana, Inc., which I am informed is a corporation of the United States, was at all the times above mentioned and still is the time charterer of the "Navemar" from the Compania Espanola de Navegacion Maritima, S. A., her owner, and that time charter party still has six months to run with, I understand, an option for renewal for another period. The agents of the owner and of the time charterer of the "Navemar" in connection with her business at New York on arrival here were Garcia & Diaz of No. 17 Battery Place, New York City, who are still the agents and have been such agents in connection with such business ever since I have been captain of the "Navemar." Such agents under usual practice in the steamship business would enter the "Navemar" in the Custom House on arrival here, would give the bond to the Collector of the Port in connection with the discharging of her cargo, and would collect the freight from the various consignees on behalf of the time charterer, Linea Sud Americana, Inc., and did all these things on this occasion of the "Navemar's" arrival and discharge at New York and Edgewater last November.

I annex hereto as Exhibits "A-1" and "A-2" (English translation) and make a part of this affidavit a copy of the sobordo, which is the ship's record of the "Navemar," showing the freight which was earned on this voyage from Rosario and Buenos Aires to New York, ending on Decem-
[fol. 220] ber 1, 1936, on the completion of discharge of her cargo.

At 8:00 A. M. on December 2, 1936, the "Navemar" left the Archer-Daniels pier at Edgewater, New Jersey, and sailed to Red Hood Flats, Brooklyn, New York harbor, and came to anchor in the anchorage grounds, coming to anchor at about 9:30 A. M. on December 2, 1936. She has remained at anchor there ever since. I and the other officers of the ship employed by the libellant Compania Espanola de Na

vegacion Maritima, S. A., excepting the second officer, Rafael Crespo, third engineer Honorio Escudero, fourth engineer, Manuel Freire, the second engineer, Arturo Garcia, are on board the "Navemar" in charge of her, subject to the Marshal's custody as security for certain libellants, other than the Spanish Government, possession of the "Navemar" having been delivered to me as representing the Compania Espanola de Navegacion Maritima, S. A., by the Marshal of the above entitled Court on December 14, 1936.

Shortly after the "Navemar" arrived at New York on November 25, 1936, I went in ordinary course to the agents of the ship, Messrs. Garcia & Diaz at No. 17 Battery Place, New York City, and reported the arrival of the "Navemar" and asked for instructions. They told me to go ahead with the discharging of the cargo, in accordance with the charter party to Linea Sud Americana and the bills of lading and that the "Navemar" was still under charter and would make another round voyage to Buenos Aires.

Shortly after that I took the ship's roll with me to the Spanish Consul General's office in New York City in ordi- [fol. 221] nary course of ship's business and deposited the ship's roll with him. On depositing it with him I called the attention of the Spanish Acting Consul General, Luis Careaga, to the endorsement that had been made on it and told him what had happened, as I have stated it above in this affidavit. I also showed Mr. Careaga the cables and radiograms. Mr. Careaga said that he didn't know anything about it and that he had no instructions whatsoever. Then, I said to Mr. Careaga that I would have to proceed with the discharging of the cargo and that I wanted to know something definite, to which Mr. Careaga replied that he was going to telegraph Madrid and ask for instructions, and that I should come back the following day and he would let me know whatever news he had from Madrid. When I went back the following day he informed me that he had not received a reply, that he was still in the same position, that he did not know anything. I told Mr. Careaga that I must know something, that I must start discharging because as soon as we finished discharging I would have to turn over the "Navemar" to the time charterer again for loading another general cargo for Buenos Aires. Then, Mr. Careaga told me to proceed unloading very slowly, so

that in the meantime he would be able to get some news from Madrid, to which I replied that I could not do anything like that, that the unloading would have to be completed as soon as possible, that it was not up to me to delay it, that we had to discharge as quickly as possible under our contract with the consignees.

Then, Mr. Careaga replied that in that case I should go ahead with the unloading, but that after the unloading was completed we would see what would happen. In the [fol. 222] meantime he was expecting to receive orders from Madrid, and in the meanwhile we would just have to wait. I urged him to do something definite one way or the other in the matter and to get something to me in writing which would state his position and be definite, so that I could show it to the charterers and the owner and so that the matter could be settled without any delay to the ship.

Mr. Careaga then called the Spanish Ambassador at Washington by long distance telephone, and Mr. Careaga then dictated to a stenographer in my presence and delivered to me a letter in writing which he signed personally and which reads as follows, and a photostatic copy of which is marked Exhibit "B" and annexed hereto as part of this affidavit.

"Consulate Generale of Spain, 515 Madison Avenue, New York.

No. 2988

In replying mention number of this letter.

New York, November 28, 1936.

It is my duty to inform you as per instructions received from His Excellency, the Ambassador of the Nation in Washington, the ship of your command is from this date at the disposition of the government of the Republic and you must await new instructions from him in anything concerning future activities and give me, at the earliest [fol. 223] possible moment a detailed statement of the expenses of said ship such as salaries, victuals, etc., as well as a relation of the repairs of small importance that you are at the present time having effected.

(Signed) Luis Careaga, Consul in Charge.

Mr. Manuel Martinez,
Captain of the Spanish S/S Navemar,
New York."

After I was handed the foregoing letter by Mr. Careaga I pointed out to Mr. Careaga that the "Navemar" was under charter to the Linea Sud-Americana, who was urging to have the boat made ready for loading again for Buenos Aires and to proceed fulfilling the terms of the charter contract, and that if that was not done there would be innumerable claims as the outcome, and that the Consul himself would receive claims for this unwarranted delay. I also told Mr. Careaga that the Compania Espanola de Navegacion Maritima, S. A., her owner, would have to be consulted for authority because it would also have to make good damages to the cargo owners and to Linea Sud Americana, and I told Mr. Careaga that I had no advice from the owner of the vessel, Compania Espanola de Navegacion to the effect that the boat belonged to the Spanish Government. Mr. Careaga replied that if there are any claims coming let them come, that any contracts entered into before had no effect whatsoever now and that I was to receive instructions from him and that the Spanish Ambassa- [fol. 224] dor at Washington had told Mr. Careaga that I was to receive instructions from Mr. Careaga only. To that I told him I will have to communicate with my owners, or representatives, Garcia & Diaz in New York, and see what they have to say about the matter, which I accordingly did, and the owners told me that Mr. Careaga's position was entirely without legal authority and that I was to take instructions only from the owner of the ship, Compania Espanola de Navegacion Maritima, S. A.

I, accordingly, following the instructions of the owner, Compania Espanola de Navegacion Maritima, S. A., Mr. Marcelino Garcia, President and Director, discharged the general cargo and linseed cargo, as I have already stated above.

While the "Navemar" was at anchor on Red Hook Flats, after having discharged the last of her cargo at Edgewater, New Jersey, I, on instructions from the owner, Compania Espanola de Navegacion Maritima, S. A., arranged with the Robins Dry Dock & Repair Company to have repairmen come on board the "Navemar" to make some repairs which had been requested of me by the chief engineer of the "Navemar."

On the evening of December 1, 1936, while the "Navemar" was still at the pier at Edgewater, New Jersey, five

members of the crew, Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, came to me on board the "Navemar" and said that they had just been elected by the crew as a committee to take charge of the provisions and the pay of the crew. They were accompanied by several other members of the crew. I told them [fol. 225] that the committees which were authorized by Spanish law did not have the extent of authority over provisions and pay which they were asserting. At about 7 o'clock the next morning, while the "Navemar" was still moored to the pier at Edgewater, the five members of the committee left the ship. At 8:00 A. M. on December 2nd, I, under instructions from the owner of the "Navemar," Compania Espanola de Navegacion Maritima, S. A., had the "Navemar" leave the pier at Edgewater and proceed to anchor in the anchorage grounds on Red Hook Flats, Brooklyn. Shortly after that, on the same morning, I went ashore and went to Mr. Careaga's office and told him that these five men had come to me and said they had been elected a committee of the crew, and that they were asserting authority over provisions and over pay, which was in excess of any authority under Spanish law or regulations. Mr. Careaga said that committee had already been there and that he approved of it. I then asked him whether any further instructions to him had come from Madrid and he said No. I didn't go back to the ship on that day, December 2nd, because the weather was very bad for a small boat going out, but I did go to the offices of Garcia & Diaz and the Linea Sud-Americana, Inc. While there a Mr. Isdale, a consulting engineer who has on several occasions had charge of repairs being made on the "Navemar," came to those offices and seeing me told me that he and a repair gang from Robins Dry Dock & Repair Company had been prevented by the crew of the "Navemar," on orders of a so-called committee, from making the repairs I had ordered [fol. 226] on the owner's instructions. The next morning, December 3rd, I went on board the "Navemar" to see about this and discovered that the facts were as stated to me by Mr. Isdale and that many members of the crew had suddenly become very hostile. I saw the five members of the so-called committee and asked them what right they had to interfere with my orders or to stop the repairmen from Robins Dry Dock from doing the work that I had ordered.

They replied that they were doing so on instructions from Mr. Careaga and a Mr. Diaz. I then ordered that two of that committee accompany me that very same day, December 3rd, to go to Mr. Careaga and see who was master and in charge of the "Navemar." I thereupon left the "Navemar" with two members of the committee, Mr. Manuel Freire and Mr. Rafael Crespo and we went to Mr. Careaga's office. I also took along with us another member of the crew who was not a member of the committee, Jose Fano, because it had been reported to me confidentially by one of the officers of the "Navemar" that I had better get Fano off the ship if I wanted to prevent his being beaten up by other members of the crew because of his Fascist sympathies.

We all went to the Spanish Consul General's office and I requested one of the employees to notify the Consul that we were there and that we would like to see him. We were told to wait and while we were waiting I noticed a man whom I later learned was a Mr. Celestino Diaz, and saw him go out into the hall. Almost immediately afterwards the two members of the committee who were waiting with me, Manuel Freire and Rafael Crespo, left the room and [fol. 227] also went out into the hallway and remained out there about ten minutes, and while I was still waiting to see the Consul this Mr. Celestino Diaz returned and went into the Consul's office. About three seconds later the two members of the committee returned from the hall through the same door, to where I was waiting. Shortly afterwards the Acting Consul General, Luis Careaga, came out himself to where we were waiting and said Hello, Captain, what are you doing here? I replied to him I came here to complain to you about the committee, to which he said Come in, and he ushered me into his office and I saw this Mr. Celestino Diaz sitting there. Mr. Careaga asked me to sit down, which I did, and then he asked me Well, what have you got to say? I said Well, I am here with Manuel Freire and Rafael Crespo, who are two members of that committee, to protest against the action of the committee in preventing from being carried out the work which I have ordered and of which Mr. Careaga knew. Mr. Celestino Diaz interrupted and said that the committee had done very well. I replied that they had done very bad, and asked who he was, that is, who Mr. Celestino Diaz was, that he should speak like that to me, and that I had come to speak to the Consul

and not to anyone else. To that he replied that he was an agent of the Spanish Government. I replied that I did not know him. At that Mr. Careaga introduced Mr. Celestino Diaz to me as an agent of the Spanish Government. I have since been informed that Mr. Celestino Diaz has never been listed as an agent of the Spanish Government with the [fol. 228] Secretary of State of the United States at Washington, D. C. Then Mr. Careaga asked me Are those repairs so urgent that they have to be made? I replied that, as I had already informed him, whenever a ship arrived from an extended voyage and it was necessary to go on with another voyage, it was always necessary to make certain repairs to fit the ship for the next voyage, and, furthermore, that since the "Navemar" was classified by Lloyd's and had the highest classification, A-1, to comply with the requirements of such classification and the maintaining of such rating, it was necessary to maintain the ship in first-class condition, so as to merit that classification, and that these repairs were necessary for that purpose. To that Mr. Careaga said Forget about Lloyd's, or classifications, or anything, that does not mean anything to us. I replied that the owners would certainly complain because they had the boat classified and they wanted to keep it within that classification. Mr. Careaga said Well, forget about the owners and Lloyd's, we are the owners of the boat now and we will know what to do about the whole thing.

After that had transpired, I told Mr. Careaga that the provisions were running very low and that the crew had no money, and that they were asking to have money advanced to them to meet their personal expenses, and that since the owner refused to give provisions or pay them any money I was informing him to see what could be done. Mr. Careaga replied that the owner should take care of supplying the boat with provisions and paying the crew, and that he, Mr. Careaga, would settle with the owner, Compania Espa- [fol. 229] nola de Navegacion Maritima, S. A. To that I replied that I could not carry messages back and forth, that Mr. Careaga should notify Messrs. Garcia & Diaz, the representatives of the owner, or write them a letter to that effect. To that Mr. Careaga replied that he knew better than to do anything like that, that he did not want Mr. Garcia to slap him. I told Mr. Careaga that Mr. Garcia was a gentleman, that he would not slap anybody, to which Mr. Careaga replied I know the kind of cloth, which is an idiom-

atic expression in Spanish, meaning I know whom I am dealing with. Then Mr. Careaga told me to go ahead and order provisions and advance money to the crew, that he himself would give me the necessary money for the purpose. I told Mr. Careaga that I didn't want anything to do with that, that I knew better and that that was, as he must know, a matter for Garcia & Diaz or the owner of the ship to take care of and that I didn't want to be involved in a position of that nature, or handle any money from the Consul General for any such improper purpose as if the Consul General were the owner; that I wanted to keep my hands clean, and that I would rather have the boat supplied with food and the crew with money advances in the same manner that the owner had done up to the present time, that I didn't want to act as intermediary in taking money from the Consul for such expenses because I always had my hands clean and I knew the inference that would be drawn from such dealings, and that I didn't want to lend myself to later be accused of misappropriation of money or accepting improper money. Then Mr. Careaga called the members [fol. 230] of the committee to come in. Mr. Celestino Diaz interrupted and said before they come in they will have to be selected. I asked what he meant by that, being selected, to which Mr. Celestino Diaz replied that together with the members of the crew was Mr. Fano who was persona non grata. To this I said that Mr. Fano was not there in any official capacity, or as a member of the committee, that he was there as a friend of mine and that I was taking him to some friends of mine to stay. To this Mr. Diaz mentioned that he knew all about it, and that he knew what I was doing with Mr. Fano. I replied that I was doing that for Mr. Fano because he was the son of another captain who was a friend of mine and that I would do the same for a son of his or a son of Mr. Careaga's under the same circumstances. The fact that Mr. Celestino Diaz mentioned that he knew about Mr. Fano made me believe that during his absence from the office when he was followed by the two members of the committee and spent ten minutes in the hallway or wash room they were talking about this thing. Then the two members of the committee came in Mr. Fano remaining outside. Mr. Careaga informed the members of the committee that he would make arrangements for provisions to be supplied to the boat and for the payment of the members of the crew, and that the committee would be the one to

control the question of provisions and of pay for the members of the crew. Mr. Careaga also informed the members of the committee that repairs would not be made and that anything that would be done on board would be with the knowledge and approval of the committee, and that nothing [fol. 231] would be done without their knowledge and consent. I protested then that in that case I had nothing to do in there because in fact he was attempting to depose me as master of the boat, and that I would not accept it, that if there was going to be other authority than mine or the real owner's on board I would go to Garcia & Diaz' office, and that in case they should want me for anything they should communicate with me there. To this Mr. Careaga replied Yes, go right ahead, and if there are any instructions we will notify you. Before I left I informed Mr. Careaga that his attempting to countermand orders for loading given by the time charterer on authority from Garcia & Diaz, representing the real owner was likely to cause me personally a considerable financial loss because I had personally advanced members of the crew money to be repaid to me personally when they should collect their salaries, as I had been in the habit of doing until their salaries were settled at the end of the voyage or on owner's instructions before a Consul, and that I had no money of my own as I had used all the money I had in making these advances and that I wanted to know who was going to settle with me; that since Mr. Careaga was not obtaining authority from the owners to settle the crew's wages and was apparently not going to discharge them from their shipping contract with the owners and as he had mentioned that he was going to take care in the future in some indefinite and unusual way of the salaries of the crew I wanted to know if when the salaries were settled I could get back from the members of the crew the advances made by me from my own personal funds. To [fol. 232] this Mr. Careaga replied that he would settle with me immediately for the advances I had made to the crew, and he asked me to let him know how much money was involved. I told him that I didn't have the exact figures, but that it was about $300., with which Mr. Careaga wrote out a check for $300., in my name and gave it to me. Upon delivering me the check Mr. Careaga asked me to sign a receipt and I insisted on keeping a copy of it, which I marked Exhibit "C" and annexed hereto and make a part

of this affidavit. A translation in English of that receipt reads in full as follows:

"Consulate General of Spain, New York

Received from the Honorable Consul General of Spain in New York the amount of $300. as an advance to attend to the expenses of the vessel of my command.

New York, December 2, 1936.

—— ——, Master of Steamer 'Navemar.' "

I took the check to the people I was told were the brokers for the Consul General, Winchester Company, and they cashed the check. I kept $300. because it was reimbursement of the $300. I had advanced to the crew. Under the contract of employment of shipping articles, the payment of wages is to be made on the completion of the trip at the end of the voyage, but the members of the crew, especially [fol. 233] if it is a long voyage, ordinarily request that advances be made to their families or relatives directly to meet their living expenses.

My later difficulties while on board the "Navemar" at Red Hook Flats, Brooklyn, in maintaining my authority as master on behalf of her owner, Compania Espanola de Navegacion Maritima, S. A., have already been testified to by me at the hearing of the suit against her owner's insubordinate employees among the crew who were trying to wrest control of the vessel from me unlawfully and without her owner's consent.

Manuel Martinez.

Sworn to before me this 11th day of January, 1937. Anthony Libersky, Notary Public. Queens County No. 2339. Queens County Register's No. 1663. N. Y. Co. Clk's No. 308, Reg. No. 8L178. Commission expires March 30, 1938. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

Manuel Noriega, being first duly sworn, deposes and says:

I am thoroughly familiar with both the Spanish and English languages and have acted as interpreter on numerous occasions.

I have correctly and fully translated into the English language, as shown by the annexed affidavit of Captain [fol. 234] Manuel Martinez Diaz of the Spanish Steamship "Navemar" all the statements made to me in the Spanish language by him and also correctly and fully translated to him in the Spanish language the oath administered to him by the Notary Public.

Manuel Noriega.

Sworn to before me this 11th day of January, 1937. Anthony Libersky, Notary Public. Queens County No. 2339. Queens County Register's No. 1663. N. Y. Co. Clk's No. 308, Reg. No. 8L178. Commission expires March 30, 1938. (Seal.)

EXHIBIT "B" TO AFFIDAVIT.

Consulado General de Espana, 515 Madison Avenue, Neuva York.

Neuva York, Noviembre 28 de 1936.

Numero 2988.
Al Contestar Mencionese
El Numero de Esta Carta

Cumpleme poner en conocimiento de V. S. que segun instrucciones recibidas del Excmo. Senor Embajador de la [fol. 235] Nacion en Washington, queda el buque de su mando, desde esta fecha, a disposicion del Gobierno de la Republica, debiendo V. S. esperar nuevas instrucciones del mismo por lo que se refiere a sus futuras actividades y presentarme, a la mayor brevedas, una relacion detallada de los gastos de dicho buque, como son salarios, manutencion, etc. asi como la cuenta de las obras de reparacion de menor cuantia que esta actualmente effectuando.

Luis Careaga, Consul Encargado.

Senor Don Manuel Martinez,
Capitan de vapor espanol "Navemar."
Nueva York.

EXHIBIT "C" TO AFFIDAVIT

Consulado General de Espana, Nueva York.

Recibi del Senor Consul General de Espana en Nueva York, la cantidad de Trescientos Dolares ($300.00) en concepto de adelanto para atender gastos del buque de mi mando.

Nueva York, Diciembre 2 de 1936.

——— ———, Capitan del Vapor "Navemar."

(Here follow 3 photolithographs, side folios 236, 237 and 238.)

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PAGE

154A

236

S.A. de Representaciones Marítimas
GARCIA + DIAZ, Ltda
BUENOS AIRES

REPORT AND MANIFEST of the cargo laden on board of the "NAVEMAR" VOY. #1, of _____

owned by _____ whereof _____ is Master, capacity of _____ net tons;

Built at _____, State of _____, and owned as set forth in Register granted at Sarnia

on _____, 19____, which cargo was taken on board at ROSARIO Sailing Oct. 29/36 for port of NEW YORK

GARCIA & DIAZ
STEAMSHIP AGENTS
17 BATTERY PLACE
NEW YORK

B/L No.	SHIPPERS	CONSIGNEES	MARKS AND NUMBERS	Number of Packages	Kind of Packages	CONTENTS	FREIGHT	Gross Weight Kilos
	CIA. DE COMERCIO LTDA. VAN WAVEREN	ORDER	N/M N/M	IN BULK		LINSEED	# 29.019.09	732,000 Collein
								(1)

1548

Form 87-SHM-5-36 L & S

237

REPORT AND MANIFEST of the cargo laden on board of the "NAVEMAR" VOY. # 1, of

owned by whereof is Master, capacity of net tons;

Built at, State of, and owned as set forth in Register granted at

on, 19, which cargo was taken on board at BUENOS AIRES for port of NEW YORK

GARCIA & DIAZ
STEAMSHIP AGENTS
17 BATTERY PLACE
NEW YORK

	B/L No.	SHIPPERS	CONSIGNEES	MARKS AND NUMBERS	Number of Packages	Kind of Packages	CONTENTS	REMARKS	Gross Weight Kilos
	1	CIA. ANGLO S.A.	BANK OF MONTREAL	"K.O." N/N	1000	BAGS	STEARINE	IN BOND TO KITCHENER, ONTARIO # 249.69	507 36 COLLECT
	2	DELBENE HNOS Y CIA.	ORDER	FEDERAL 82/121 B PRODUCT ARGENTINE	40	DRUMS	GLYCERINE	# 149.60 FREIGHT PREPAID	27636
	3	EDUARDO C. GARCIA	DO.	J.B. 775/82	8	CASES	RAW SKINS		2040
				J.B. 783/84	2	BALES	VENADO AND DEER SKINS	#. 62.80 FREIGHT PREPAID	
	4	CRAWFORD KEEN & CIA.	DO. -NTFY-BALFOUR GUTHRIE & CO.	B. G.	833	BAGS	CROWN CASEIN	# 245.96	40980 COLLECT
	5	CIA. DE COMERCIO LTDA. VAN WAVEREN	ORDER	B. G. PRODUCT ARGENTINE N/M N/N	4502 IN	DO. BULK	LINSEED	# 2.955.22	292600 COLLECT
	6	ELIAS HOOS S.A..	DO.	WHITE PAINTED E.M. 55	5000	HIDES	DRY CATTLE	# 684.92	50028 COLLECT
	7	CRAWFORD KEEN & CIA.	ORDER-NTFY-BALFOUR GUTHRIE & CO.	WHITE BRAN PRODUCT OF ARGENTINE	1089	BAGS	WHEAT BRAN	# 309.83	50366 COLLECT
	8	JUAN CURCIJA	ORDER-NTFY-ARTHUR G. DUNN	G. A. S. ARGENTINA	1627	DO.	CORN	# 500.00	101600 COLLECT
	9	LA PLATA CEREAL CO. S.A.	ORDER		IN	BULK	MAIZE	# 6.697.84	1361000 COLLECT
	10	DO.	DO.	PRODUCT OF ARGENTINE	2991	BAGS	DO.	# 688.98	100000 COLLECT

(2)

1540

Form 37-32M-5-34 L & S

238

REPORT AND MANIFEST of the cargo laden on board of the "MAIMAR" VOY. # 1, of

owned by whereof is Master, capacity of net tons;

Built at , State of , and owned as set forth in Register granted at

on , 19 , which cargo was taken on board at BUENOS AIRES for port of HAVANA - CUBA

GARCIA & DIAZ
STEAMSHIP AGENTS
17 BATTERY PLACE
NEW YORK

	B/L No.	SHIPPERS	CONSIGNEES	MARKS AND NUMBERS	Number of Packages	Kind of Packages	CONTENTS	REMARKS	Gross Weight Kilos
	1.	GRAGLIA HNOS.	ORDER-NIFY-JOSE ORTEGA - P.O. BOX1208 - HAVANA	B.B. 51/51	21	BALES	BROOM CORN	# 67.14 FREIGHT PREPAID	3100
	2.	DO.	DO.	M. M. 101/152	52	DO.	DO.	108.26 FREIGHT PREPAID	5000
	3	DO.	DO.	O. O. 133/160	52	DO.	DO.	108.26 FREIGHT PREPAID	5000
	4	WINKLER & CO.	ORDER	P. V. H. 1/143	143	DO.	DO.	440.00	20000 COLLECT
	5	STEIGER & CO.	GALLARDO HIJO	K.K.S. 1/140	140	DO.	GUINEA STRAW	440.00	20000 COLLECT
	6	DO.	JOSE FERNANDEZ	M. M. T. 1/140	140	DO.	DO.	440.00	20000 COLLECT
	7	DO.	MARCELINO BANUZAS	T. T. H. 1/140	140	DO.	DO.	440.00	20000 COLLECT
	8	DO.	CIA ESCOBERA CUBANA	S. & C. 1/150	150	DO.	DO.	770.00	35000 COLLECT
				215/260	46	DO.			
				151/214	64	DO.			

(3)

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[fol. 239] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CALIXTO GOYENECHE

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Calixto Goyeneche, being duly sworn, deposes and says:

I am and have been continually during the last two years Chief Steward of the Spanish steamship "Navemar," having been duly signed in the roll of the crew of said vessel in which I still am registered. In the contract with the owners and operators of the steamship "Navemar," Compania Espanola de Navegacion Maritima, S. A., I have been in charge and still am of feeding the crew of the steamship "Navemar." I was on board the "Navemar" in the Argentine and up to her arrival at New York, and have been [fol. 240] continuously on board the steamship "Navemar" since her arrival at New York on November 25, 1936, excepting that I went ashore at 11:00 A. M. on Saturday, December 12, 1936, and remained ashore in New York until 10:00 A. M., Monday, December 14, 1936.

In my capacity of Chief Steward and as contractor that I am for the feeding of the crew of said vessel by contract with its owners and operators, the Compania Espanola de Navegacion Maritima, S. A., I personally inspected all the provisions that were taken on board to be used. In the discharge of my mission I examined all the provisions that were taken on board at New York from the date of the arrival of the steamship "Navemar" to this port, November 25, 1936. From said arrival at New York, there was not taken on board other than the provisions ordered or requested by me and which I checked to make sure that they corresponded in quantity as well as quality with those ordered by me.

After the steamship "Navemar" had finished the Health Inspection and carried out the fumigation the date of her arrival, November 25, 1936, she went to the pier at State Barge Canal located at the foot of Columbia Street in Brooklyn, New York, where she arrived at 5:00 P. M. on said day. On November 27th, due to the 26th being a holiday,

the landing of the general cargo on the pier was started and it was completed on Saturday, the 28th. At 8:00 A. M. on Monday, November 30th, the "Navemar" left the pier at Brooklyn for the pier at Edgewater, New Jersey, where she went to discharge the linseed. She arrived at said pier at 11:00 A. M. the same day and started to discharge, which [fol. 241] was completed on December 1st at 6:00 A. M. With this the discharge of all cargo that the vessel had aboard was completed.

On the 2nd day of December, 1936, the "Navemar" left the pier at Edgewater, New Jersey, and came to anchor at Red Hook Flats, Brooklyn, New York Bay, where she came to anchor at 9:30 A. M., having remained there at anchor up to the present time.

Captain Martinez was on board the "Navemar" until December 4th, when the vessel was already at anchor at Red Hook Flats. The chief officer and the third officer and the chief engineer remained on board several more days until they left for the trial in the Court at Brooklyn on December 9, 1936.

Since the 2nd of December everything that came aboard came by launch because the vessel was anchored in the bay and a great distance from shore. I was watching when any launch arrived to received my provisions.

Since the 2nd of December until the 15th of December, when Captain Martinez and the officers previously mentioned returned on board, there was not any cargo either taken on board or landed. The only things received on board were the provisions requested for me as already indicated.

The feeding of the crew has always been in conformity with the Spanish legislation and rules in effect regarding this matter. Under the agreement I have with the owners and operators, they pay me a set sum for each member of the crew on each day of feeding. The total amount being settled at the completion of the voyage.

The purchase of the necessary provisions to take care [fol. 242] of the feeding of the crew of the "Navemar" is for my own account and I made the purchases in big enough quantities to obtain the best qualities and prices possible. Naturally I do not purchase a greater quantity of perishable foods than which I can use before it spoils.

When the steamship "Navemar" arrived at New York on November 25, 1936, I had in the stores a good supply

of provisions. The supply of fresh vegetables, fruits and fish was naturally not as great.

When the steamship "Navemar" arrived at New York I was in charge of the feeding of the crew, in accordance with my agreement with the owners before mentioned, and I continued doing so in the same manner until the 3rd of December, 1936, when the master of the steamship "Navemar," Mr. Manuel Martinez, communicated with me that since a committee of the crew had been formed on board, named by the said crew and since the same crew and committee had just revolted against the master and the owners, refusing to recognize the authority of both, the owners and the master, acting on their instructions, were notifying me that under such circumstances and due to the insubordination and revolt of the crew, from said date, December 3, 1936, they could not authorize me any longer to feed the crew for account of the owners.

I then said that if I was not paid for the food I would not feed anybody, because since I had to pay for the food I had to buy, it was imperative for me to collect for the food I served. I also said that I didn't possess financial means, and such is the truth, that would allow me to [fol. 243] give the food away. When the crew learned of this they became aroused and they came to me and told me that they had to eat, and that if I refused to feed them they would open the stores by force and would take the food, and that if necessary they would throw me overboard.

When things were at this stage, a person, whom I was informed was Mr. Celestino Diaz, came aboard and stayed on board about half an hour. Mr. Celestino Diaz told me that I could continue in charge of the feeding of the crew as up to then, and that he would ask the Consul to pay for the feeding. I told him that in that case they would have to pay me for the supplies of food which I had on board in the stores, because I didn't have money to purchase the balance of the provisions that would be needed from day to day, as fish, fruit, vegetables, etc. Mr. Celestino Diaz told me that he would ask the Consulate to pay for everything.

Mr. Celestino Diaz suggested that I make, as it was needed, a list of the provisions that were required on board and that I give said list to the committee of the crew for their approval so that the additional provisions that would be needed would be delivered on board. I did as requested,

and when the provisions asked for in this manner were delivered, they demanded that I sign a receipt for same. I requested that since I sign a receipt, they allow me to keep a copy of the receipt I sign; but they would not allow it. The committee kept the receipts. I limited the orders to the things absolutely necessary, of perishable foods of which I was running short in my supply. From the 3rd of December, 1936, when these arrangements had started until [fol. 244] December 15th, I estimate that in the feeding of the crew, the food used was 75% from my supply in the stores and only the remaining 25% brought from ashore in the manner already indicated.

As time was passing and nobody paid me anything and I was in need of money I claimed several times from the members of the committee and from Mr. Celestino Diaz, when he came on board again for a short visit, that they pay me. The answer each time was that I shouldn't worry, that they would pay me, but they have never paid anything to me.

After the Marshal of the United States Court named in the heading of this deposition had delivered the vessel to the master, Mr. Manuel Martinez, for account of the owners, and the crew left the steamer, I continued, by account of the owners, taking care of the feeding of the master, officers and firemen, who came on board to take care of the vessel and of the marshals of the above named Court, who alternated in the custody of the steamer.

I kept track of the cost of my own provisions that were used for the feeding of the crew from the 3rd of December, 1936, until the 15th of December. Days went by and nobody paid me. Tired of waiting, I went personally on Saturday, January 2, 1937, to see Mr. Careaga, Consul of Spain at New York, at his office of the Consulate General. I arrived at the office of the Consulate General and explained to Mr. Fernando Borrell, Chancellor of the Consulate General of Spain at New York, the motive of my visit, requesting him to communicate it to Mr. Careaga, requesting him in my name for an interview to present it to him personally. [fol. 245] Mr. Borrell went, as I understand, to the private office of Mr. Careaga, which is located within the general offices of the Consulate and sometime later he returned and told me that Mr. Careaga refused to see me and said that he didn't want to know anything about me, that Mr.

Careaga said that if I wanted to collect for the provisions used in the feeding of the crew (that I go to claim it to Garcia & Diaz, who were the owners of the "Navemar," and that they should pay me. When Mr. Borrell was transmitting to me the reply of Mr. Careaga, there was present Mr. Estanislao Perez, who had accompanied me to the Consulate and Mr. Perez heard what Mr. Borrell said Mr. Careaga had replied. I protested to Mr. Borrell against the stand taken by Mr. Careaga and I requested him that he remind him that Mr. Celestino Diaz had promised me to ask Mr. Careaga to pay me for the feeding of the crew of the steamship "Navemar." Mr. Borrell answered me that he could not insist again with Mr. Careaga, because the manner in which he had said what he had just repeated to me, would not leave any room for doubt that Mr. Careaga did not wish to see me. I then decided to wait in the office of the Consulate for Mr. Celestino Diaz, where I learned he was being expected. When he arrived some time later, I explained to him what had happened and I told him that what they were doing with me was unjust because I am a poor man that has to earn his living. That already, before I consented to feed the crew of the "Navemar," the 3rd day of December, I had told him that I could not do it unless they pay me and that he, Mr. Celestino Diaz, had [fol. 246] promised that they would pay me. Mr. Celestino Diaz answered me that I should not worry, that I should bring the bill of which I claim, and that it would be arranged that everything was paid for. He told me to bring the bill in duplicate one copy for the Consulate and the other to be sent to Washington. I promised him that on the following Monday I would bring the bill to the Consulate.

On Monday, the 4th of January, I went again to the Consulate of Spain and I requested to see Mr. Careaga, to deliver to him the bills. Mr. Borrell again attended to me and he went to communicate to Mr. Careaga that I wished to see him, to deliver to him the bills. Mr. Careaga was at that moment outside of his private office, in the general offices of the Consulate, and within view of myself from where I was waiting. In such manner that I could see and hear Mr. Careaga when Mr. Borrell went to give him my message. I could see and hear perfectly that Mr. Careaga replied to Mr. Borrell negatively and with negative ges-

tures and showed great annoyance. Mr. Borrell turned around to me and told me, "You have heard what Mr. Careaga says." I replied that I had heard. Nevertheless, Mr. Borrell repeated to me what Mr. Careaga had said. Mr. Careaga said, "I already told you last Saturday all I have to say. I have nothing to do with him (meaning me) and I do not want to see or listen to him. He should go and claim from Garcia & Diaz."

It wouldn't have been necessary for Mr. Borrell to have told me this because I had heard this when Mr. Careaga was talking to Mr. Borrell.

After that I went to Garcia & Diaz, agents for the Compania Espanola de Navegacion Maritima, S. A., and pre- [fol. 247] sented my claim to them for victualling and supplying the vessel and all the crew on board from December 3, 1936 to December 15, 1936, and Garcia & Diaz paid my claim in full and I gave them a receipt in full, a true and correct copy of which I annex hereto, marked Exhibit "A," as part of this affidavit.

Nobody representing the Spanish Government has furnished or paid me for any victuals or supplies to the "Navemar" since her arrival at New York on November 25, 1936, and no victuals or supplies have been received on board her excepting those that I have personally supplied, and for which I have been paid by Garcia & Diaz and the relatively very small extra victuals which I have above mentioned and which I personally checked. Neither Mr. Celestino Diaz nor anyone else has paid me for any provisions of mine on board the "Navemar" and I have never delivered any of them to him or to anyone else at his request. All unused provisions on board the "Navemar" are my personal property and in my personal possession at the present time, and no one else has any interest in them or right to them. Aside from the short visits of Mr. Celestino Diaz above mentioned, there has been nobody on board the "Navemar" excepting the members of the crew who were in the service of her owner, Compania Espanola de Navegacion Maritima, S. A., under shipping articles or employment contract which will not expire until her arrival at Barcelona, and excepting the Deputy United States Marshals of the Brooklyn Federal Court. Nor was anyone in the service of the Spanish Government, or representing it, on board the "Navemar" at any time while she was in

[fol. 248] Buenos Aires or Rosario or elsewhere before her arrival in New York, or since her arrival in New York. I know Mr. Luis Careaga and know that he has never been on board the "Navemar," and that the "Navemar" has never been in his or the Spanish Government's possession or service, or subject to his or its service at any time. The "Navemar" has always been in the service of her owner, Compania Espanola de Navegacion Maritima, S. A.

Calixto Goyeneche, (Signed) C. Goyeneche.

Sworn to before me this 19th day of January, 1937.
Francis L. Goonan, Notary Public, Kings Co.
(Seal.)

[fol. 249] EXHIBIT "A" TO AFFIDAVIT

Form No. 07 10M 11-36 PB.

Copy

Garcia & Diaz, New York:

January 5, 1937.

Received from Garcia & Diaz, Agents for Compania Espanola de Navegacion Maritima, S. A., Owners of the Spanish S/S "Navemar", the sum of $593.81 (Five Hundred and Ninety-three Dollars and Eighty-one Cents), in full payment for all victuals provision and supplies furnished to the S/S "Navemar" and to her officers and crew, during the period from December 2nd, 1936, to December 15th, 1936, inclusive.

New York, January 5, 1937.

C. Goyeneche, Chief Steward of the Spanish S/S "Navemar".

Vto. Bo.

Manuel Martinez, Capitan "Navemar".

[fol. 250] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ESTANISLAO PEREZ

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Estanislao Perez, being first duly sworn, deposes and says:

I am sixty-three years old and am a naturalized American citizen and have resided for several years last past and now reside in the City of Brooklyn, State and Eastern District of New York.

I am the Estanislao Perez who is mentioned in the affidavit of Mr. Calixto Goyeneche, sworn to on this day, the 19th day of January, 1937, and I have read that affidavit of Mr. Calixto Goyeneche, and the facts stated therein with [fol. 251] respect to what Mr. Borrell, the Chancellor of the Spanish Consulate General at New York City, said to Mr. Calixto Goyeneche in my presence and hearing are true and correct of my own knowledge, and I confirm said affidavit of Mr. Calixto Goyeneche in all respects in so far as it relates to me and Mr. Borrell, as I heard all that was said.

Estanislao Perez.

Sworn to before me this 19th day of January, 1937. Anthony Libersky, Notary Public. Queens Co. No. 2339. Queens County Register's No. 1663. N. Y. Co. Clk's No. 308, Reg. No. 8L178. Commission expires March 30, 1938. (Seal.)

[fol. 252] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MANUEL NORIEGA

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Manuel Noriega, being first duly sworn, deposes and says:

I am thoroughly familiar with the Spanish and English languages and have acted as interpreter in those languages

on numerous occasions and so acted during part of the trial of the above-entitled cause.

I have translated in full into the English language the statements made to me in the Spanish language by Mr. Calixto Goyeneche and they have been transcribed correctly and fully in the affidavit of Mr. Calixto Goyeneche [fol. 253] which is annexed hereto, sworn to on the 19th day of January, 1937.

Again, after said affidavit was typed in the English language I translated it back in full again into the Spanish language to Mr. Calixto Goyeneche, and he confirmed that it was in all respects true.

I also at the request of the notary public, Francis L. Goonan, on the 19th day of January, 1937, translated to Mr. Calixto Goyeneche in the Spanish language the oath which the said notary public administered to Mr. Calixto Goyeneche and Mr. Goyeneche replied in the Spanish language, swearing that the statements in his said affidavit are in all respects true and I thereupon translated to the notary public in the English language that statement of Mr. Goyeneche, whereupon Mr. Calixto Goyeneche signed and affixed his signature to said affidavit and said notary public thereupon affixed his own signature and seal to said affidavit of Mr. Calixto Goyeneche.

Manuel Noriega.

Sworn to before me this 19th day of January, 1937. Anthony Libersky, Notary Public. Queens Co. No. 2339. Queens County Register's No. 1663. N. Y. Co. Clk's No. 308, Reg. No. 8L178. Commission expires March 30, 1938. (Seal.)

[fol. 254] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES W. RYAN

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

James W. Ryan, being first duly sworn, deposes and says:

I am an attorney at law and a member of the bar of the above-entitled Court and a member of the law firm of

Messrs. Bigham, Englar, Jones & Houston, proctors for libellant in the above-entitled cause.

Shortly before December 19th, I deposited with the Postal Telegraph Company in New York City, a common carrier by telegraph, a message to the Secretary of State of the United States, Department of State, Washington, D. C., [fol. 255] asking whether Celestino Diaz was listed with the Secretary of State as being an agent of the Government of the Republic of Spain connected with the Spanish diplomatic service in Washington or the Spanish consular service in New York.

On the 19th day of December, 1936, I received in ordinary course from a telegraph messenger employed by the said Postal Telegraph Company a reply message from R. Walton Moore, Acting Secretary of State, the original of which I annex hereto and mark Exhibit "A," and make a part hereof, and which reads as follows:

"THE DEPARTMENT HAS NO RECORD OF ANYONE BY THE NAME OF CELESTINO DIAZ BEING CONNECTED WITH THE SPANISH DIPLOMATIC SERVICE IN WASHINGTON OR THE SPANISH CONSULAR SERVICE IN NEWYORK"

JAMES W. RYAN.

Sworn to before me this 19th day of January, 1937. Francis L. Goonan, Notary Public. Kings Co. Clk's No. 424, Reg. No. 7073. Cert. filed in New York Co. Clk's No. 107; Reg. No. 7-G-56. Certificate filed in Westchester Co. Commission expires March 30, 1937. (Seal.)

[fol. 256] EXHIBIT "A" TO AFFIDAVIT

SD WASHINGTON DC 445P DEC 19 1936

MR. JAMES W RYAN
99 JOHN ST NEWYORK NY

THE DEPARTMENT HAS NO RECORD OF ANYONE BY THE NAME OF CELESTINO DIAZ BEING CONNECTED WITH THE SPANISH DIPLOMATIC SERVICE IN WASHINGTON OR THE SPANISH CONSULAR SERVICE IN NEWYORK

R WALTON MOORE ACTING SECRETARY OF STATE

[fol. 257] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A-15,102.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant,

against

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents

Appearances:

Bigham, Englar, Jones & Houston, Esquires, Proctors for Libellant; James W. Ryan, of Counsel.

Jesse L. Rosenberg, Esquire, Proctor for His Excellency, Fernando de Los Rios, Ambassador of the Republic of Spain, by Lynch, Hagen & Atkins, Esquires; Horace T. Atkins, Esquire and Charles W. Hagen, Esquire, of Counsel.

OPINION, GALSTON, D. J., ON SECOND APPLICATION—January 28, 1937

GALSTON, D. J.:

This is a second application made upon the affidavit of Luis Careaga, Secretary of Embassy and Consul in charge [fol. 258] of the Consulate General of Spain in New York, who seeks on behalf of the Ambassador of the Republic of Spain to open a default and vacate a decree heretofore entered in behalf of the libellant awarding to the libellant possession of the steamship "Navemar." An application for the same relief was made on December 16, 1936, and denied with permission, however, to renew the application upon a proper showing.

This affidavit recites that there is an existing treaty between Spain and the United States by the terms of which there is granted to the envoys, ambassadors, ministers, charges d'affaires and other diplomatic agents of each of the countries the same favors, privileges and immunities and exemptions which are granted or shall be granted to the most favored nation.

It is alleged that the steamship "Navemar" is a Spanish vessel within the meaning of Article 11 of the treaty in that

the steamship was and is under the flag of Spain and is furnished with the papers which the laws of Spain require.

It appears that on October 10, 1936, a decree relating to this steamship was issued by the Minister of Communications and Merchant Marine of the Republic of Spain, which decree among other matters recites that the Republic of Spain attaches the steamship "Navemar" of the Compania Espanola de Navegacion Maritima, S. A., for use of the National Public Service, and that it be managed by the Minister of Communications and Merchant Marine through the General Bureau of Merchant Marine. It was decreed that the attachment and the consequent change of authority [fol. 259] would be noted in the official registry of vessels and in the central registry of the General Bureau and on the documents of the vessel, and in the corresponding consular registries.

The Careaga affidavit further sets forth that on November 25, 1936, the steamship arrived in the port of New York in the command of her master, Manuel Martinez, acting for and in behalf of the Republic of Spain and under the direction of the Minister of Communications and Merchant Marine through the General Bureau of the Merchant Marine; that on said day Martinez, as master, deposited the ship's roll with Careaga and that the ship's roll is now in his possession. Careaga avers that the ship's roll shows that the "Navemar" arrived at Buenos Aires, Argentine, on October 9, 1936; that the vessel departed on October 16, 1936, for Rosario, Argentina, and arrived at Rosario on October 18, 1936, returning to Buenos Aires on October 26, 1936, from which port she sailed for New York on October 28, 1936. It is averred that the ship's roll discloses that Antonio I. Serrano, Spanish Consul in the port of Rosaria, endorsed on the ship's rolls a legend which translated reads:

"Through a cable dated 26th of the inst. month from the Director General of the Merchant Marine, this ship has become the property of the State through attachment according to the decree of October 10, 1936."

Careaga avers that he is informed and believes, though the source of his information is not set forth, that on Octo- [fol. 260] ber 28, while the steamship was at Buenos Aires, Amador Sanchez, Acting Consul General at said port, made an endorsement on the ship's register reading as follows:

"Through a cable dated October 15, 1936, to the Spanish Embassy in this capitol, His Excellency, the Minister of State, notifies that this vessel has become the property of the Spanish Government through a decree of attachment published in the Offieial Gazette dated the 11th of the instant month."

Accordingly Careaga alleges that he is informed and believes—though no other sources of information than the foregoing is disclosed—that the sailings of the "Navemar" after November 15, 1936, were made at the direction and under the control of the representatives of the Spanish Republic.

On the arrival of the vessel in New York, Careaga, acting under instructions from the Ambassador of the Republic of Spain, His Excellency Fernando de los Rios, instructed Martinez that the master should await further instructions from Careaga as to any further use of the steamship "Navemar." On November 28, 1936, Careaga instructed Martinez to present a detailed account of the expenses of the "Navemar" covering salaries, food and the bill for the work and repairs of minor importance that the vessel might undergo. Thereafter Martinez delivered to Careaga an account of the crew of the boat and delivered a statement setting forth contemplated repairs. Careaga, so he recites, on behalf of the Republic of Spain, made partial payments on account of salaries and wages [fol. 261] of the master and crew and "manned, victualed and supplied the vessel." On December 7, 1936, Careaga relieved Martinez of command and appointed Thomas Pasqual to act as master.

It is alleged that the vessel was held in New York by representatives of the Spanish Government for use by the Spanish Government to carry cargo from New York to Spain for the purpose of the Spanish Government, it being the intention of the Government to use said vessel for such public purpose. Concluding, Careaga alleges that when the libel herein was filed, the vessel was in the possession of the Republic of Spain and subject to its direction and control for use in the national public service and that accordingly the vessel was not subject to suit or process without the consent of the Republic of Spain and in the absence of such consent is immune from the process of the court.

The question before me is whether in the present showing the moving papers meet the deficiencies which led to the denial of the former application. Exceptions are filed by the libellant. Briefly these exceptions recite that the moving papers are insufficient in setting forth ownership by the Republic of Spain, possession by the Republic of Spain, public use or operation of the vessel by the Republic of Spain, either in Argentine or in New York, or indeed at any time or place.

Reply affidavits are filed by the libellants. Martinez, the master of the vessel, deposes that neither the Spanish Consul at Rosario nor at Buenos Aires took possession of the "Navemar" nor did either of them inform him that [fol. 262] they wished to take possession of the vessel or had instructions so to do. He alleges that it is the usual practice of Spanish ship masters of privately owned merchant vessels to deposit the ship's roll with the Consul on arriving at a port and receive it back before sailing, the ship's roll being merely a record of the arrivals and sailings of the vessel, together with a record of the kind of cargo carried, passengers and the signing on or enrollment of each member of the crew. The ship's roll is not a document of title nor of possession. Neither is the ship's register a document of title or possession. The register shows the flag or nationality of the vessel as determined by the place where her home port is situated. In the ordinary course of business on arrival at Rosario Martinez deposited the ship's roll with the Consul at that port, which in ordinary course would have been returned to him just before sailing. However, the Consul's office was closed for the day. He was advised by shippers of the linseed cargo at Rosario that although the cargo intended to be shipped had not all yet been loaded, it was imperative that the "Navemar" sail at once because the water was going down in the river and she would be delayed too long if she did not said immediately. The shippers agreed to make arrangements to deliver the rest of the linseed cargo to the "Navemar" when she arrived at Buenos Aires and the representative of the Linea Sud-Americana, Inc., the charterer of the steamship "Navemar," informed him that he would call at the consul's office at Rosario when it opened the next morning, to obtain the ship's roll and would send it by mail to Martinez, % Linea Sud-Americana, Inc., at

[fol. 263] Buenos Aires. Accordingly the "Navemar" sailed at 5 P. M., October 23, 1936, without her ship's roll. After the "Navemar's" return to Buenos Aires, arriving there at 2 P. M. October 24, 1936, he was informed that the Spanish Consul at Rosario had declined to deliver the ship's roll to the agent of the Linea Sud-Americana, Inc., and would deliver it only to the master of the "Navemar." Subsequently the Spanish Consul General at Buenos Aires obtained the ship's register from the master and returned both it and the ship's roll to him. The master noted the endorsement thereon made by the Consul at Rosario and on the register by the Consul General at Buenos Aires. The latter said he had no instructions to make with respect to the "Navemar" and that she should continue her voyage. Nothing was said about taking possession. The Spanish Consul General at Buenos Aires, however, did tell Martinez to notify Madrid that he was sailing and accordingly Martinez did cable the General Director of Merchant Marine at Madrid, on October 29, 1936:

"Authorized by Consul General here sail for New York. Greetings.

(Signed) Master 'Navemar.' "

The "Navemar" is an ordinary commercial type freight steamer, of 9,000 tons cargo carrying capacity. Carrying a general cargo for various private shippers as a common carrier for hire, she had sailed from New York September 11, 1936. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Monte Video, the vessel arrived at [fol. 264] Buenos Aires on October 9, 1936, left on October 16th, arrived at Rosario October 17th, sailed from Rosario on October 23rd, after having been loaded at Rosario with 5800 tons of linseed in bulk shipped by private shippers to Archer-Daniels Company, a corporation of the United States, to be delivered at Edgewater, New Jersey. Again at Buenos Aires on October 24, 1936, she was loaded with more linseed for the same consignee and with 2200 tons of general cargo shipped by various other private shippers to various private consignees in the port of New York. She arrived at New York at 7 A. M. November 25, 1936, and on November 27, 1936, began to discharge her general cargo at the State Barge Canal Pier in Brooklyn. The vessel then left for Edgewater, New Jersey, and completed dis-

charging the linseed on December 1, 1936. The freight was earned and was payable to the Linea Sud-Americana, Inc., on each and every shipment of the general cargo and on the linseed cargo and each consignee was required to pay freight to Linea Sud-Americana, Inc., before obtaining a delivery order for the cargo. The Linea Sud-Americana, Inc., is a corporation of the United States and was and is a time charterer of the "Navemar" from the Compania Espanola de Navegacion Maritima, S. A. The time charter still had six months to run. The agents of the owner and of the time charterer in connection with her business in New York on arrival were Garcia & Diaz, who are the agents and have been such agents of the "Navemar" since Martinez was captain. They collected the freight from the various consignees on behalf of the time charterer on the [fol. 265] occasion of the "Navemar's" arrival and discharge at New York and Edgewater.

Martinez, when the "Navemar" arrived at New York in the ordinary course of his duties, went to the office of the agents of the ship in New York, Messrs. Garcia & Diaz, and reported the arrival and asked for instructions. He was told to go ahead with the discharge of the cargo in accordance with the charter and the bills of lading, and that the "Navemar" was still under charter and would make another round voyage to Buenos Aires. Shortly thereafter he took the ship's roll to the Spanish Consul General's office in New York, also in the ordinary course of business, and deposited the ship's roll with him. He pointed out to Mr. Careaga the endorsement that had been made thereon and showed him the cables and radiograms. Mr. Careaga told him that he knew nothing about it and that he had no instructions whatsoever. Mr. Careaga said he would cable Madrid for instructions. Martinez apparently wanted a reply before beginning the discharge of the cargo. "Then, Mr. Careaga told me to proceed unloading very slowly so that in the meantime he would be able to get some news from Madrid, to which I replied that I could not do anything like that, that the unloading would have to be completed as soon as possible and that it was not up to me to delay it, that we had to discharge as quickly as possible under contract with our consignees."

Careaga then called the Spanish Ambassador by long distance telephone and afterwards dictated and gave Mar-

tinez a letter dated November 28, 1936, wherein it is set forth that in accordance with instructions received from the [fol. 266] Ambassador, "the ship of your command is from this date at the disposition of the government of the Republic and you must await new instructions from him in anything concerning future activities and give me, at the earliest possible moment, a detailed statement of the expenses of said ship such as salaries, victuals, etc., as well as a relation of the repairs of small importance that you are at the present time having effected."

Martinez reported this to the agents of the owners who told him that Careaga's position was without legal authority and that he was to take instructions only from the owners of the ship. Accordingly he followed the instructions of the owner, the Compania Espanola de Navegacion Maritima, S. A. and discharged the general cargo and linseed cargo as heretofore stated. Thereafter he made arrangements, acting on instructions from the owner, for repairs to be made by the Robins Dry Dock & Repair Company, which had been requested by the chief engineer of the "Navemar."

On December 1, 1936, while the "Navemar" was still at the pier at Edgewater, five members of the crew approached him on board the "Navemar" and said that they had been elected by the crew as a committee to take charge of the provisions and the pay of the crew. At 7 o'clock the next morning they left the vessel. At 8 o'clock the same morning, December 2, the "Navemar" left the pier at Edgewater and proceeded to anchor in the anchorage grounds off Red Hook flats. Martinez then visited Careaga and told him that five men had come to him and said that they had been elected a committee of the crew and that they were assert- [fol. 267] ing authority over provisions and pay which was in excess of any authority under Spanish law or regulations. Careaga said that the committee had already been to see him and he approved of it. Meanwhile Martinez learned that the repair gang from Robins Dry Dock had been prevented by the crew of the "Navemar," on orders from the so-called committee, from making the repairs which had been ordered on the owner's instructions. Discussion with the crew developed that they said they were acting on instructions from Careaga and a Mr. Diaz. Thereupon Martinez with two members of the committee visited Careaga. Careaga informed the members of the crew that

he would make arrangements for provisions to be put on the boat and for payment of the members of the crew, and that the committee would be authorized to control the question of provisions and of pay. Careaga also informed them that repairs would not be made and that anything done on board would be with the knowledge and approval of the committee and that nothing would be done without their knowledge and consent. Martinez protested.

It thus appears that all material allegations and proof are before the court. The affidavit of the Spanish Consul General adds nothing to the position heretofore assumed by him. On the contrary, it is now clear beyond peradventure that prior to the seizure of the steamship "Navemar" in territorial waters of the United States by the committee of the crew, the steamship "Navemar" was never in the possession of the Republic of Spain. Pressed at the argument counsel was compelled to concede that at most only a [fol. 268] "constructive possession" could be asserted prior to the seizure in New York Harbor. Neither under the law of nations nor of local law is authority cited which impels a holding that such "constructive possession" is the equivalent of physical possession. So far as can be ascertained, certainly in none of the classic cases decided either in the United States or in England, has such an issue been determined.

Of course, the courts of this country will not question the legality of the edict of a friendly foreign nation. Thus the legality of the decree of the Republic of Spain of October 10, 1936, wherein is set forth the confiscation of the steamship "Navemar" by the Spanish State, will be conceded. What the effect of such edict is on property seized beyond its domain and sovereignty is, of course, quite another matter. In United States v. Belmont, 85 Fed. (2d) 542, the Circuit Court of Appeals for this circuit held that with respect to property physically located within Russian territory,

"there can be no doubt that the decree of confiscation was effective to transfer title, and that after recognition of the Soviet Government by the executive branch of our own government, the courts of this country must enforce titles and rights valid according to Russian law with respect to such property. * * * But the doctrine is otherwise with respect to property outside its own territory which a for-

eign state attempts to confiscate. Laws of foreign governments have extraterritorial effect only by comity and the [fol. 269] public policy of the forum determines whether its courts will give effect to foreign legislation. It is very clear that it is contrary to the public policy of the state of New York to enforce confiscatory decrees with respect to property located here at the date of the decree. Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N. Y. 369, 378, 189 N. E. 456, 91 A. L. R. 1426; see, also, N. Y. Sess. Laws 1936, c. 917, adding Civil Practice Act, Sec. 977-b. The same general principle is recognized in Baglin v. Cusenier Co., 221 U. S. 580, 596, 31 S. Ct. 669, 55 L. Ed. 863. Also in England. Lecouturier v. Rey., L. R. 1910 A. C. 262, 265. This is likewise the view prevailing in most of the European countries. See authorities collected in 39 Yale L. J. 1130, 1153, et seq.

Now the case for the Republic of Spain is certainly no better than that of the Russian Government. On the contrary its position is if anything not nearly so tenable, for the facts disclose that disregarding the orderly processes of the local law, an attempt was made forcibly to seize property within the domain of the United States. It is extremely difficult to believe that the claim of immunity set up herein by the Spanish Consul General appearing for the Spanish Ambassador, can stem from any such acts. Certainly there is nothing set forth in the opinion of Chief Justice Marshall in *The Exchange*, 11 U. S. 116, wherein he reviews the circumstances out of which immunity might be asserted to cover a seizure within our own territorial limits.

Not only is there no support in precedent in circum- [fol. 270] stances such as are here disclosed, but there is none in reason or public policy. Baldly, the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. In all reason the answer to such question must be in the negative.

Moreover, the position of the present claim need not rest on such broad though controlling base. For the reasons set forth in the opinion denying the former application this application must also be denied. The steamship "Navemar" was not an armed vessel, was not a vessel in the pub-

lic service of the Republic of Spain, was not possessed by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer.

Finally it may be said that there is nothing in the treaty between Spain and the United States which warrants a seizure within the United States.

It is urged that the court should not assume jurisdiction because the libellant is an alien corporation, organized pursuant to the laws of the Republic of Spain. Proof, however, [fol. 271] shows that this corporation was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States. In Russian Fleet v. United States, 282 U. S. 488, it is said:

"The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. Wong Wing v. United States, 163 U. S. 228, 238; compare Yick Wo v. Hopkins, 118 U. S. 356, 369; Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394, 396; Truax v. Raich, 239 U. S. 33, 39; Terrace v. Thompson, 263 U. S. 197, 216; Home Insurance Co. v. Dick, 281 U. S. 397, 411."

The application is denied and this time without leave to renew, since it must be assumed all the facts have been fully presented.

Settle order on notice.

Clarence G. Galston, U. S. D. J.

[fol. 272] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF ENTRY OF ORDER

SIRS:

You and Each of You are Hereby Notified that an order in the form annexed hereto will be submitted to the above entitled Court for settlement and signature at the office of the Clerk of the above entitled Court, on the fourth floor of the Federal Building, in the Borough of Brooklyn, City and Eastern District of New York, at 2:00 o'clock P. M. on Tuesday, the 2nd day of February, 1937.

Dated, February 1, 1937.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, 99 John Street, New York, N. Y.

[fol. 273] To Jesse L. Rosenberg, Esq., 15 Park Row, New York, N. Y., and Lynch, Hagen & Atkins, Esqs., 111 John Street, New York, N. Y., Proctors for Fernando de los Rios, Ambassador of the Republic of Spain.

[fol. 274] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING APPLICATION TO INTERVENE—February 3, 1937

The second application of Fernando de los Rios, Ambassador of the Republic of Spain, by order to show cause issued by the above entitled Court on the 8th day of January, 1937, why the default of the respondents should not be reopened so as to permit said Fernando de los Rios to appear specially as claimant of the Steamship "Navemar," [fol. 275] and why the final decree entered herein on the 14th day of December, 1936, should not be set aside and vacated, and for other relief, having duly come on to be heard, and Luis Careaga, Secretary of Embassy and Consul in charge of the Consulate General of Spain in New York, having filed an affidavit dated the 6th day of January, 1937, in support of said order to show cause or application, and

Jesse L. Rosenberg having also filed an affidavit dated the 6th day of January, 1937, in support of said order to show cause or application; and the libellant having filed its return to said order to show cause, and its exceptions and objections to said order to show cause and to said second application of said Fernando de los Rios annexed to said order to show cause, and the libellant having submitted in evidence as part of its return the complete transcript of record and exhibits in the above entitled cause; and the libellant having also submitted in evidence as part of its return an affidavit, with accompanying exhibits, of Manuel Martinez, master of the Spanish Steamship "Navemar," dated the 11th day of January, 1937, and an affidavit of Manuel Noriega dated the 11th day of January, 1937; and the Court having read and duly considered the foregoing documents; and the Court having heard Horace T. Atkins, Esquire, appearing on behalf of Jesse L. Rosenberg, Esquire, proctor for said Fernando de los Rios in support of said order to show cause or application, and the Court having heard James W. Ryan, Esquire, of Messrs. Bigham, Englar, Jones & Houston, proctors for libellant, in opposition thereto, and the matter having been submitted to the Court, and due deliberation having been had, and the [fol. 276] Court having filed herein on the 28th day of January, 1937, its opinion in writing, directing the entry of an order vacating said order to show cause and denying said second application of said Fernando de los Rios, Ambassador of the Republic of Spain; and other good cause appearing therefor;

It is Hereby Ordered that the said order to show cause issued on the 8th day of January, 1937, be and the same hereby is vacated and set aside, and that said second application of said Fernando de los Rios, Ambassador of the Republic of Spain, to vacate the final decree and reopen the default of the respondents, and to permit said Fernando de los Rios to appear in the above entitled cause as claimant of the said Steamship "Navemar," be and the same hereby is denied and this time without leave to renew, since it must be assumed all the facts have been fully presented; and

It is Hereby Further Ordered that said exceptions and objections filed herein by the libellant to said order to show cause and to said second application of said Fernando de los Rios be and the same hereby are sustained.

Clarence G. Galston, United States District Judge.

[fol. 277] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please Take Notice that petitioner, Fernando de los Rios, Ambassador of Spain to the United States of America, in behalf of the Republic of Spain, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the default decree entered herein on the 14th day of December, 1936, and from the decisions and orders entered herein on the 4th day of January, 1937, and on the 3rd day of February, 1937, sustaining the exceptions of the [fol. 278] libellant and denying the motion to open the default, and from each and every part of said decree, decisions and orders as well as from the whole thereof.

Dated, New York, February 3rd, 1937.

Yours, etc., Jesse L. Rosenberg, Proctor for His Excellency, Fernando de los Rios, Ambassador of the Republic of Spain, 15 Park Row, New York City.

To Bigham, Englar, Jones & Houston, Proctors for Libellant, 99 John Street, New York City. Thomas A. McDonald, Proctor for Manuel Freire, et al., 15 William Street, New York City. Crowell & Rouse, Proctors for Robins Drydock & Repair Co., 111 Broadway, New York City.

[fol. 279] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR APPEAL

Fernando de los Rios, petitioner herein, appearing specially, as Ambassador of the Republic of Spain, in behalf of the Republic of Spain, being aggrieved by the final decree entered in the United States District Court for the Eastern District of New York, bearing Docket No. A. 15,102 on the 14th day of December, 1936, and by the decisions and order

of this Court entered on January 4, 1937, and on the 3rd day of February, 1937, sustaining libellant's exceptions and denying petitioner's motion to open the default, hereby [fol. 280] prays that an appeal be allowed from said decisions final decree and orders to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, February 3, 1937.

Fernando de los Rios, Ambassador of the Republic of Spain, Petitioner, by Jesse L. Rosenberg, His Proctor.

ORDER ALLOWING APPEAL

Upon the foregoing petition, it is ordered that the appeal herein prayed for by the petitioner, Fernando de los Rios, be and the same hereby is allowed.

Dated, Brooklyn, New York, February 3rd, 1937.

Martin T. Manton, U. S. C. J.

[fol. 281] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Petitioner, Fernando de los Rios, Ambassador of Spain, in behalf of the Republic of Spain, in the above entitled cause, assigns error to the decree entered herein on the 14th day of December, 1936, the decision made on the 31st day of December, 1936, the order entered thereon on the 4th day of January, 1937, the decision made on the 28th day of January, 1937, and the order entered thereon on the 3rd day of February, 1937, by the United States District Court for the Eastern District of New York, in the following respects:

[fol. 282] 1. In that the District Court entered a default decree giving possession of the steamship Navemar to the libellant.

2. In that the District Court took jurisdiction of a controversy solely between citizens of the Republic of Spain involving the right to possession of a Spanish steamship.

3. In that, although the libel on its face related to a controversy between the master and crew concerning internal disorders on the vessel, of which controversy the Court had no jurisdiction, the Court nevertheless considered the case and rendered a decision in favor of the libellant.

4. In that the District Court took jurisdiction of this cause in a possessory action without service of monition on the Republic of Spain, although libellant had notice of the interest of the Republic of Spain in said vessel.

5. In that the District Court failed to permit the petitioner to appear specially in this proceeding for the purpose of raising the question of jurisdiction.

6. In that the District Court failed to allow said petitioner to appear specially in this proceeding for the purpose of claiming the right to possession of the steamship Navemar.

7. In that although the District Court found that there was a satisfactory explanation of the delay on the part of the [fol. 283] petitioner for failing to appear originally herein the Court nevertheless, as a matter of law, ruled that the Republic of Spain was not entitled to possession of the steamship Navemar.

8. In that although from the documents of the steamship Navemar and the testimony presented before the District Court, it appeared that the Republic of Spain had taken possession of the steamship Navemar for its public use and that it was entitled to continued possession of said steamship, the Court nevertheless awarded possession of the steamship Navemar to the libellant.

9. In that the District Court failed to give full force and effect to a decree of the Sovereign Government of Spain.

10. In that the District Court on affidavit alone, held that the Republic of Spain was not entitled to possession of the steamship Navemar, although the issue was one of fact.

Dated, New York, February 3rd, 1937.

(S.) Jesse L. Rosenberg, Proctor for Petitioner, 15 Park Row, New York City.

[fol. 284] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER AS TO CONTENTS OF RECORD—March 13, 1937

Petitioner, Fernando de los Rios, Ambassador of Spain to the United States of America, having appealed to this [fol. 285] Court from the order of the United States District Court for the Eastern District of New York, entered on the 3rd day of February, 1937, unconditionally denying intervention, and the appeal from the said order having been allowed by this Court on the 3rd day of February, 1937, and a motion having duly come on to be heard to settle the record on appeal, and having duly been argued on the 8th day of March, 1937, by the proctors for the respective parties, and due deliberation having been had, it is

Ordered, that the record on appeal herein include the following papers:

1. Docket entries.
2. Libel.
3. Order fixing time for return of process.
4. Stenographer's minutes, pages 1 to 109, and pages 169-200, inclusive.
5. Final decree.
6. Marshal's return on final decree.
7. Order to show cause and suggestion (first application).
8. Answer to suggestion, including exceptions and affidavits.
9. Supplemental suggestion.
10. Opinion of District Court on first application.
11. Order sustaining exceptions.
12. Order to show cause (second application to intervene).
13. Return of libellant, including exceptions and affidavits.

[fol. 286.] 14. Opinion of District Court on second application.

15. Order of February 3rd denying application to intervene.
16. Notice of appeal.
17. Petition and order for appeal.
18. Assignment of errors,

and it is further

Ordered, that all the exhibits filed in the United States District Court for the Eastern District of New York, in this cause, may be omitted from the printed record on appeal with leave, however, for proctors for either party to hand up to this Court, or file with the Clerk, three photostatic sets of such of the exhibits as the said proctors may desire this court to consider as part of the record on appeal.

Martin T. Manton, United States Circuit Judge.

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[fols. 287-288] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant-Appellee,

vs.

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents; Fernando de Los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant

STIPULATION

It is hereby stipulated and agreed, that the foregoing is a true copy of the part of transcript of the record of the said District Court in the above-entitled matter ordered by the United States Circuit Court of Appeals on March 13, 1937, to be included in the printed record on appeal.

Dated, April 17, 1937.

Jesse L. Rosenberg, Proctor for Appellant. Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 289] UNITED STATES OF AMERICA,
Eastern District of New York, ss:

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant-Appellee,

vs.

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant

CLERK'S CERTIFICATE

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New

York, do hereby certify that the foregoing is a correct copy of the part of the transcript of the printed record ordered filed by the United States Circuit Court of Appeals in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the above entitled District Court to be hereunto affixed, at the City of New York in the Eastern District of New York, this 19 day of April, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the said United States the one hundred and sixty-first.

Percy G. B. Gilkes, Clerk. (Seal.)

[fol. 290] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar", Libellant,

against

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents; Fernando de Los Rios, Ambassador of Spain to the United States of America, Petitioner

NOTICE OF MOTION

SIRS:

You are hereby notified that a motion in the form annexed hereto will be made by libellant-appellee at the regular hearing of the motion calendar by the above entitled Court at 10:30 o'clock A. M., on Monday, the 15th day of February, 1937, in the courtroom thereof in the Federal Court House, Foley Square, Borough of Manhattan, New York City.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellees.

To Jesse L. Rosenberg, Esq., Proctors for Appellant, 15 Park Row, New York, N. Y.

[fol. 291] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar," Libellant-Appellee,

against

Spanish Steamship "NAVEMAR," Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of Spain to the United States of America, Petitioner-Appellant

MOTION OF APPELLEE TO VACATE ORDER ALLOWING APPEAL AND TO VACATE RESTRAINING ORDER, ETC.

Brief Statement of the Facts

On December 14, 1936, the final decree was entered in the above entitled cause by the United States District Court for the Eastern District of New York, there having been a default by all five of the respondents and no one having filed any claim as owner or interested in the "Navemar" and no one having filed any general or special appearance in opposition to the libel. After the default occurred and before entering the decree the District Court had set the cause for hearing and the testimony of the master of the [fol. 292] vessel and her other officers was taken, and the ship's documents and various other documents were introduced in evidence, and the testimony of the president and director of the owner of the "Navemar" was taken, and the original bill of sale showing libellant's title and right to her possession was introduced in evidence.

On December 14, 1936, the United States Marshal for the Eastern District of New York executed the final decree by delivering possession of the "Navemar" to the libellant, and shortly afterwards filed his return with the Clerk of the District Court, stating that the final decree had been executed by delivery of possession of the vessel to the libellant.

On December 16, 1936, an order to show cause was issued by the District Court returnable on December 23, 1936,

why the final decree should not be vacated. The order to show cause was obtained on application of Luis Careaga, Acting Spanish Consul General at New York, purportedly on behalf of Fernando de los Rios, Ambassador of the Republic of Spain.

On January 4, 1937, the District Court entered an order vacating the order to show cause and denying the application to vacate the final decree, in accordance with the written opinion filed by the Court on December 31, 1936, but granting permission to make a second application, the Court having held that no showing of a meritorious defense had been made in the application.

[fol. 293] On January 8, 1937, another order to show cause was issued returnable on January 12, 1937, why the final decree should not be vacated.

On February 3, 1937, the District Court entered an order vacating the order to show cause issued on January 8, 1937, and denying the second application of Luis Careaga, on behalf of Fernando de los Rios, Ambassador of the Republic of Spain, to vacate the final decree, the order being pursuant to an eighteen page written opinion filed by the District Court on January 28, 1937. The District Court held that all the facts on both sides were before it and that no meritorious defense was set forth in the second application to open the default.

On February 3, 1937, Jesse L. Rosenberg, a proctor, allegedly on behalf of Fernando do los Rios, Ambassador of Spain, presented to Honorable Martin T. Manton, United States Circuit Judge, a petition for an order allowing an appeal, supported by an affidavit of Charles W. Hagen, stating that Judge Galston (the District Judge who tried the case and entered the final decree and heard the applications to vacate it) had refused to allow an appeal from said decree and order and to sign a restraining order. On the 3rd day of February, 1937, Judge Manton signed an order allowing the appeal, which was filed on February 4, 1937, and although libellant-appellee had not been notified of the application for the restraining order, issued a restraining order against not only libellant-appellee, but [fol. 294] against parties in other causes, although the order was not entitled in such other causes.

No bond in favor of libellant-appellant was required by the restraining order to be filed by the persons who had

obtained that order ex parte, notwithstanding the order prevented the normal use of the "Navemar" by the libellant-appellee, to whom possession of the vessel had been delivered by the Marshal in executing the final decree before any application to vacate the final decree was made. Nor was any supersedeas bond required of appellant, nor was any cost bond required of it.

Further facts are stated or found by the District Court in its written opinion filed January 28, 1937, denying the second application to vacate the final decree, that opinion being reported in 1937 American Maritime Cases at page 26, but not yet officially reported in the Federal Supplement, and a copy of that opinion is annexed hereto marked "Exhibit A". Two earlier opinions filed by the District Court in this case are reported in 1937 American Maritime Cases at pages 15 and 23, but are not yet officially reported in the Federal Supplement.

The facts are rather fully stated in succinct and chronological form in the affidavit of Manuel Martinez, the master of the Navemar dated January 11, 1937, and filed at the hearing of the second application to vacate the decree.

A rather full summary or statement of the facts established by the evidence at the trial, or set forth in documents filed at the hearings of the two applications made to vacate the final decree, is annexed hereto as "Exhibit B" for the Court's convenience if it desires it.

[fol. 295] Objects of the Motion

The libellant-appellee, Compania Espanola de Navegacion Maritima, S. A., hereby respectfully moves that an order be entered by the above entitled Court,

(1) vacating the order allowing the appeal in so far as it allows an appeal to be taken from a final decree by a person who is not, and has never been, a party to the action, and who did not appear or intervene, or apply for leave to appear or intervene, either generally or specially in the action before the final decree was entered; and/or

(2) vacating the entire order allowing the appeal, and/or dismissing the appeal, on the ground that the final decree directing the respondents to deliver possession to libellant under its libel for possession had been executed by actual delivery of possession by the United States Marshal to libellant

before any special or general appearance or intervention was made, or application filed, by appellant, so that appellant's proper remedy is to file a libel of its own in the District Court against the "Navemar" and appellee for possession; and/or

(3) vacating the order allowing the appeal, and/or dismissing the appeal, in so far as it allows an appeal to be taken from the order denying the appellant's first application to vacate the final decree, on the ground, among others, that the appellant waived any right to such appeal by filing a second application to vacate the final decree and by not appealing from the denial of the first application before the [fol. 296] second application was acted upon by the District Court, and because no substantial showing has been made by appellant of a meritorious defense to the action or of any abuse of discretion by the District Court in not vacating the final decree; and/or

(4) vacating the order allowing the appeal, and/or dismissing the appeal, on the grounds, among others, that none of the five personal respondents in the action has joined in the appeal, or has been severed therefrom, and no showing has been made that those five respondents were not, at all times between service of process against the "Navemar" and on those respondents under the libel, in actual and exclusive control and possession of the vessel (although illegally because of forcible and unlawful seizure from libellant in the port of New York); and/or

(5) vacating the order allowing the appeal in so far as it allows an appeal to be taken from the order denying the second application to vacate the final decree, on the ground, among others, that no substantial showing has been made by appellant of a meritorious defense to the action or of any abuse of discretion by the District Court in not vacating the final decree; and/or

(6) vacating the order allowing the appeal, and/or dismissing the appeal, on the ground that the proof in the Record shows that actual notice of the libellant's suit for possession of the "Navemar" was furnished to the persons in sole charge of the "Navemar" at the time she was attached and process against her and said persons served by the United States Marshal for the Eastern District of New York, [fol. 297] and further shows that the appellant and his

agents or representatives had actual notice of said attachment or arrest, and no objection thereto by either general or special appearance or intervention was made by appellant until after the final decree had been entered and until after the final decree had been fully executed by delivery of possession of the "Navemar" to appellee; and/or

(7) requiring the immediate filing by appellant of a bond or proper security to cover the damages resulting to appellee from the restraining order dated February 3, 1937, obtained ex parte by appellant; and/or

(8) requiring the immediate filing by appellant of proper security or bond for costs; and/or

(9) requiring the immediate filing by appellant of a bond or proper security to cover the damages and costs resulting to appellee from being deprived of the use of the "Navemar" caused by appellant's various applications and interferences since the final decree was entered on December 14, 1936, in the District Court and prior to the restraining order issued by this Court on February 3, 1937; and/or

(10) docketing and dismissing the appeal, and/or vacating the order allowing the appeal, on the grounds, among others, that it is frivolous and without any substantial merit so far as any defense valid in law is concerned, and on the ground that it is based on an illegal, forcible, and barratrous [fol. 298] act of seizure committed by insubordinate employees of appellee in an attempt to wrest control of the "Navemar" from her lawful master and from appellee, her lawful owner, and use or transfer her for unauthorized and unlawful purposes without her lawful master's or owner's consent; and/or

(11) vacating the order allowing the appeal, and/or dismissing the appeal, on the ground that the petition for appeal is not signed by the purported appellant, Fernando de los Rios, Ambassador of the Republic of Spain, and is not signed by any officer of the Republic of Spain or by any citizen of the Republic of Spain, or by any person entitled to enter appearance as an agent of the Republic of Spain listed as such with the Secretary of State of the United States, or otherwise recognized by our law as entitled to sue or to prosecute an appeal as a foreign sovereign, and on the further ground that the purported appellant, Fernando de los

Rios, Ambassador of the Republic of Spain, has never signed any application, pleading, or other paper filed at any time in the District Court or in the above entitled Court, nor has he appeared personally or by any diplomatic representative of the Republic of Spain entitled to assert the prerogatives or rights, if any, of the Republic of Spain in litigation in this country; and/or

(12) requiring the appellant to deposit and file with the Clerk of the above entitled Court (a) the ship's roll of the [fol. 299] Steamship "Navemar" which had been temporarily deposited with the Spanish Consul General at New York by appellee's employee, the master of the "Navemar", in ordinary course of operating the "Navemar" as a privately owned merchant vessel on behalf of appellee, and (b) the printed pamphlet containing the Spanish labor organization or crew regulations, both of which were produced and deposited by said Spanish Consul General with the Clerk of the United States District Court for the Eastern District of New York in the above entitled action at the trial of the above entitled cause pursuant to subpœna duces tecum obtained by appellee and were introduced in the Record as Libellant's (Appellee's) Exhibits 12 and 13, and which have since been removed by appellant from said Clerk's office in the District Court without notice to appellee, and which constitute a proper part of the Record on appeal in this Court.

The foregoing Motion will be based on all the pleadings, proofs, exhibits, and other papers filed, and proceedings had, in the above entitled cause in the United States District Court for the Eastern District of New York; and on the affidavit of Clifford B. Merritt, Director of Bowring & Company, annexed hereto.

Bingham, Englar, Jones & Houston, Proctors for Compania Espanola de Navegacion Maritima, S. A., Libellant-Appellee, 99 John Street, New York, N. Y.

[fol. 300] STATE OF NEW YORK;
County of New York, ss:

Clifford B. Merritt, being first duly sworn, deposes and says:

I am a Director and Secretary of Bowring & Company, steamship agents and brokers, of 17 Battery Place, New York City.

I have been in the chartering business of ocean going steamers for freight at the port of New York for the last twenty-five years. There is a market at the port of New York for freight steamers of the type of the S/S. "Navemar". In the ordinary course of my business, I have acquired knowledge of the value of the use of steamers of the type of the S/S. "Navemar". The present market value of such for time chartering purposes is $1.75 per deadweight ton per month.

I know the S/S. "Navemar" and have examined her and I know that her deadweight tonnage is 9,179 tons.

In my opinion the market value of the use of the S/S. "Navemar" type in the present market is at least $1.75 per ton per month under the usual form of time charter, and I base this on the fact that the market is practically without available ships for delivery in February.

In my opinion the market value of the use of the S/S. "Navemar" type during the month of December last was $1.60 per ton per month, under the usual form of time charter.

[fol. 301] The value of freight steamers like the "Navemar" for time chartering purposes is now unusually high, and it is during such temporary and intermittent periods of high time chartering rates that profits are made from such vessels. In my opinion, keeping a vessel out of employment during such a period of prevailing high rates causes inevifably a very serious loss to the shipowner.

The market value of the "Navemar" at the present time is abnormally high owing to the present high freight rates.

Clifford B. Merritt.

Subscribed and sworn to before me this 11th day of February, 1937. C. J. White, Notary Public. Notary Public Westchester County. Cert. filed in N. Y. Co. No. 50, Reg. No. 8W41. Commission expires March 30, 1938. (Seal of Christopher J. White, Notary Public, Westchester County, N. Y.)

[fol. 302]

Bowring & Company,
Steamship Agents and Brokers,
Importers and Exporters,
17 Battery Place, New York
Telephone: Whitehall 4-8660

To Whom it May Concern: February 11, 1937.

I have been in the chartering business of ocean going steamers for freight at the port of New York for the last twenty-five years. There is a market at the port of New York for freight steamers of the type of the S/S. "Navemar". In the ordinary course of my business, I have acquired knowledge of the value of the use of steamers of the type of the S/S. "Navemar". The present market value of such for time chartering purposes is $1.75 per deadweight ton per month.

I know the S/S. "Navemar" and have examined her and I know that her deadweight tonnage is 9,179 tons.

In my opinion the market value of the use of the S/S. "Navemar" type in the present market is at least $1.75 per ton per month under the usual form of time charter, and I base this on the fact that the market is practically without available ships for delivery in February.

In my opinion the market value of the use of the S/S. "Navemar" type during the month of December last was $1.60 per ton per month, under the usual form of time-charter.

The value of freight steamers like the Navemar for time chartering purposes is now unusually high, and it is during such temporary and intermittent periods of high time chartering rates that profits are made from such vessels. In my opinion, keeping a vessel out of employment during such a period of prevailing high rates causes inevitably a very serious loss to the shipowner.

The market value of the "Navemar" at the present time is abnormally high owing to the present high freight rates.

Yours faithfully, (Sgd.) Clifford B. Merritt.

The subscriber is known to me and is a Director and Secretary of Bowring & Company.

C. J. White, Notary Public Westchester County.
Cert. filed in N. Y. Co. No. 50, Reg. No. 8W41.
Commission expires March 30, 1938.

[fol. 303] EXHIBIT "A"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

A-15102

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar", Libellant,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents

January 28, 1937.

Appearances:

Bigham, Englar, Jones & Houston, Esquires, Proctors for Libellant; James W. Ryan, of Counsel.

Jesse L. Rosenberg, Esquire, Proctor for His Excellency, Fernando de los Rios, Ambassador of the Republic of Spain, by Lynch, Hagen & Atkins, Esquires; Horace T. Atkins, Esquire, and Charles W. Hagen, Esquire, of Counsel.

GALSTON, D. J.:

This is a second application made upon the affidavit of Luis Careaga, Secretary of Embassy and Consul in charge of the Consulate General of Spain in New York, who seeks on behalf of the Ambassador of the Republic of Spain to open a default and vacate a decree heretofore entered in [fol. 304] behalf of the libellant awarding to the libellant possession of the steamship "Navemar". An application for the same relief was made on December 16, 1936 and denied with permission, however, to renew the application upon a proper showing.

This affidavit recites that there is an existing treaty between Spain and the United States by the terms of which there is granted to the envoys, ambassadors, ministers, charge d'affaires and other diplomatic agents of each of the countries the same favors, privileges and immunities and exemptions which are granted or shall be granted to the most favored nation.

It is alleged that the steamship "Navemar" is a Spanish vessel within the meaning of Article II of the treaty in that the steamship was and is under the flag of Spain and is furnished with the papers which the laws of Spain require.

It appears that on October 10, 1936, a decree relating to this steamship was issued by the Minister of Communications and Merchant Marine of the Republic of Spain, which decree among other matters recites that the Republic of Spain attaches the steamship "Navemar" of the Compania Espanola De Navegacion Maritima, S. A. for use of the National Public Service, and that it be managed by the Minister of Communications and Merchant Marine through [fol. 305] the General Bureau of Merchant Marine. It was decreed that the attachment and the consequent change of authority would be noted in the official registry of vessels and in the central registry of the General Bureau and on the documents of the vessel, and in the corresponding consular registries.

The Careaga affidavit further sets forth that on November 25, 1936, the steamship arrived in the port of New York in the command of her master, Manuel Martinez, acting for and in behalf of the Republic of Spain and under the direction of the Minister of Communications and Merchant Marine through the General Bureau of the Merchant Marine; that on said day Martinez, as master, deposited the ship's roll with Careaga and that the ship's roll is now in his possession. Careaga avers that the ship's roll shows that the "Navemar" arrived at Buenos Aires, Argentine, on October 9, 1936; that the vessel departed on October 16, 1936 for Rosario, Argentine, and arrived at Rosario on October 18, 1936, returning to Buenos Aires on October 26, 1936, from which port she sailed for New York on October 28, 1936. It is averred that the ship's roll discloses that Antonio I. Serrano, Spanish Consul in the port of Rosario, endorsed on the ship's rolls a legend which translated reads:

"Through a cable dated 26th of the inst. month from the Director General of the Merchant Marine, this ship has become the property of the State through attachment according to the decree of October 10, 1936."

[fol. 306] Careaga avers that he is informed and believes, though the source of his information is not set forth, that

on October 28, while the steamship was at Buenos Aires, Amador Sanchez, Acting Consul General at said port, made an endorsement on the ship's register reading as follows:

"Through a cable dated October 15, 1936, to the Spanish Embassy in this capital, His Excellency, the Minister of State, notifies that this vessel has become the property of the Spanish Government through a decree of attachment published in the Official Gazette dated the 11th of the instant month."

Accordingly Careaga alleges that he is informed and believes—though no other source of information than the foregoing is disclosed—that the sailings of the "Navemar" after November 15, 1936 were made at the direction and under the control of the representatives of the Spanish Republic.

On the arrival of the vessel in New York, Careaga, acting under instructions from the Ambassador of the Republic of Spain, His Excellency Fernando de Los Rios, instructed Martinez that the master should await further instructions from Careaga as to any further use of the steamship "Navemar". On November 28, 1936, Careaga instructed Martinez to present a detailed account of the expenses of the "Navemar" covering salaries, food and the bill for the work and repairs of minor importance that the vessel might undergo. Thereafter Martinez delivered to Careaga an account of the crew of the boat and delivered a statement [fol. 307] setting forth contemplated repairs. Careaga, so he recites, on behalf of the Republic of Spain, made partial payments on account of salaries and wages of the master and crew and "manned, victualed and supplied the vessel". On December 7, 1936, Careaga relieved Martinez of command and appointed Thomas Pasqual to act as master.

It is alleged that the vessel was held in New York by representatives of the Spanish Government for use by the Spanish Government to carry cargo from New York to Spain for the purpose of the Spanish Government, it being the intention of the Government to use said vessel for such public purpose. Concluding, Careaga alleges that when the libel herein was filed, the vessel was in the possession of the Republic of Spain and subject to its direction and control for use in the national public service and that accordingly the vessel was not subject to suit or process without the con-

sent of the Republic of Spain and in the absence of such consent is immune from the process of the court.

The question before me is whether in the present showing the moving papers meet the deficiencies which led to the denial of the former application. Exceptions are filed by the libellant. Briefly these exceptions recite that the moving papers are insufficient in setting forth ownership by the Republic of Spain, possession by the Republic of Spain, public use or operation of the vessel by the Republic of Spain, either in Argentine or in New York, or indeed at any time or place.

[fol. 308] Reply affidavits are filed by the libellants. Martinez, the master of the vessel, deposes that neither the Spanish Consul at Rosario nor at Buenos Aires took possession of the "Navemar" nor did either of them inform him that they wished to take possession of the vessel or had any instructions so to do. He alleges that it is the usual practice of Spanish ship masters of privately owned merchant vessels to deposit the ship's roll with the consul on arriving at a port and receive it back before sailing, the ship's roll being merely a record of the arrivals and sailings of the vessel, together with a record of the kind of cargo carried, passengers and the signing on or enrolment of each member of the crew. The ship's roll is not a document of title nor of possession. Neither is the ship's register a document of title or possession. The register shows the flag or nationality of the vessel as determined by the place where her home port is situated. In the ordinary course of business on arrival at Rosario Martinez deposited the ship's roll with the consul at that port, which in ordinary course would have been returned to him just before sailing. However, the consul's office was closed for the day. He was advised by shippers of the linseed cargo at Rosario that although the cargo intended to be shipped had not all yet been loaded, it was imperative that the "Navemar" sail at once because the water was going down in the river and she would be delayed too long if she did not sail immediately. The shippers agreed to make arrangements to deliver the rest of the linseed cargo to the "Navemar" when she arrived at Buenos Aires and the representative of the Linea Sud-Americana, [fol. 309] Inc., the charterer of the steamship "Navemar", informed him that he would call at the consul's office at Rosario when it opened the next morning, to obtain the

ship's roll and would send it by mail to Martinez, c/o Linea Sud-Americana, Inc., at Buenos Aires. Accordingly the "Navemar" sailed at 5 P. M., October 23, 1936, without her ship's roll. After the "Navemar's" return to Buenos Aires, arriving there at 2 P. M. October 24, 1936, he was informed that the Spanish Consul at Rosario had declined to deliver the ship's roll to the agent of the Linea Sud-Americana, Inc. and would deliver it only to the master of the "Navemar". Subsequently the Spanish Consul General at Buenos Aires obtained the ship's register from the master and returned both it and the ship's roll to him. The master noted the endorsement thereon made by the Consul at Rosario and on the register by the Consul General at Buenos Aires. The latter said he had no instructions to make with respect to the "Navemar" and that she should continue her voyage. Nothing was said about taking possession. The Spanish Consul General at Buenos Aires, however, did tell Martinez to notify Madrid that he was sailing and accordingly Martinez did cable the General Director of Merchant Marine at Madrid, on October 29, 1936:

"Authorized by Consul General here sail for New York. Greetings.

(Signed) Master 'Navemar'."

The "Navemar" is an ordinary commercial type freight [fol. 310] steamer, of 9,000 tons cargo carrying capacity. Carrying a general cargo for various private shippers as a common carrier for hire, she had sailed from New York September 11, 1936. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Monte Video, the vessel arrived at Buenos Aires on October 9, 1936, left on October 16th, arrived at Rosario October 17th, sailed from Rosario on October 23rd, after having been loaded at Rosario with 5800 tons of linseed in bulk shipped by private shippers to Archer-Daniels Company, a corporation of the United States, to be delivered at Edgewater, New Jersey. Again at Buenos Aires on October 24, 1936, she was loaded with more linseed for the same consignee and with 2200 tons of general cargo shipped by various other private shippers to various private consignees in the port of New York. She arrived at New York at 7 A. M. November 25, 1936, and on November 27, 1936, began to discharge her general cargo at the State Barge Canal Pier in Brooklyn. The vessel then

left for Edgewater, New Jersey, and completed discharging the linseed on December 1, 1936. The freight was earned and was payable to the Linea Sud-Americana, Inc., on each and every shipment of the general cargo and on the linseed cargo and each consignee was required to pay freight to Linea Sud-Americana, Inc. before obtaining a delivery order for the cargo. The Linea Sud-Americana, Inc., is a corporation of the United States and was and is a time charterer of the "Navemar" from the Compania Espanola [fol. 311] de Navegacion Maritima, S. A. The time charter still had six months to run. The agents of the owner and of the time charterer in connection with her business in New York on arrival were Garcia & Diaz, who are the agents and have been such agents of the "Navemar" since Martinez was captain. They collected the freight from the various consignees on behalf of the time charterer on the occasion of the "Navemar's" arrival and discharge at New York and Edgewater.

Martinez, when the "Navemar" arrived at New York in the ordinary course of his duties, went to the office of the agents of the ship in New York, Messrs. Garcia & Diaz, and reported the arrival and asked for instructions. He was told to go ahead with the discharge of the cargo in accordance with the charter and the bills of lading, and that the "Navemar" was still under charter and would make another round voyage to Buenos Aires. Shortly thereafter he took the ship's roll to the Spanish Consul General's office in New York, also in the ordinary course of business, and deposited the ship's roll with him. He pointed out to Mr. Careaga the endorsement that had been made thereon and showed him the cables and radiograms. Mr. Careaga told him that he knew nothing about it and that he had no instructions whatsoever. Mr. Careaga said he would cable Madrid for instructions. Martinez apparently wanted a reply before beginning the discharge of the cargo. "Then Mr. Careaga told me to proceed unload- [fol. 312] ing very slowly so that in the meantime he would be able to get some news from Madrid, to which I replied that I could not do anything like that, that the unloading would have to be completed as soon as possible and that it was not up to me to delay it, that we had to discharge as quickly as possible under contract with our consignees."

Careaga then called the Spanish Ambassador by long

distance telephone and afterwards dictated and gave Martinez a letter dated November 28, 1936, wherein it is set forth that in accordance with instructions received from the Ambassador, "the ship of your command is from this date at the disposition of the government of the Republic and you must await new instructions from him in anything concerning future activities and give me, at the earliest possible moment, a detailed statement of the expenses of said ship such as salaries, victuals, etc., as well as a relation of the repairs of small importance that you are at the present time having effected".

Martinez reported this to the agents of the owners who told him that Careaga's position was without legal authority and that he was to take instructions only from the owners of the ship. Accordingly he followed the instructions of the owner, the Compania Espanola de Navegacion Maritima, S. A., and discharged the general cargo and linseed [fol. 313] cargo as heretofore stated. Thereafter he made arrangements, acting on instructions from the owner, for repairs to be made by the Robbins Dry Dock & Repair Company, which had been requested by the chief engineer of the "Navemar".

On December 1, 1936, while the "Navemar" was still at the pier at Edgewater, five members of the crew approached him on board the "Navemar" and said that they had been elected by the crew as a committee to take charge of the provisions and the pay of the crew. At 7 o'clock the next morning, December 2, the "Navemar" left the pier at Edgewater and proceeded to anchor in the anchorage grounds off Red Hook flats. Martinez then visited Careaga and told him that five men had come to him and said that they had been elected a committee of the crew and that they were asserting authority over provisions and pay which was in excess of any authority under Spanish law or regulations. Careaga said that the committee had already been to see him and he approved of it. Meanwhile Martinez learned that the repair gang from Robbins Dry Dock had been prevented by the crew of the "Navemar", on orders from the so-called committee, from making the repairs which had been ordered on the owner's instructions. Discussion with the crew developed that they said they were acting on instructions from Careaga and a Mr.

Diaz. Thereupon Martinez with two members of the committee visited Careaga. Careaga informed the members of the crew that he would make arrangements for provisions to be put on the boat and for payment of the members of [fol. 314] the crew, and that the committee would be authorized to control the question of provisions and of pay. Careaga also informed them that repairs would not be made and that anything done on board would be with the knowledge and approval of the committee and that nothing would be done without their knowledge and consent. Martinez protested.

It thus appears that all material allegations and proof are before the court. The affidavit of the Spanish Consul General adds nothing to the position heretofore assumed by him. On the contrary, it is now clear beyond peradventure that prior to the seizure of the steamship "Navemar" in territorial waters of the United States by the committee of the crew, the steamship "Navemar" was never in the possession of the Republic of Spain. Pressed at the argument counsel was compelled to concede that at most only a "constructive possession" could be asserted prior to the seizure in New York Harbor. Neither under the law of nations nor of local law is authority cited which impels a holding that such "constructive possession" is the equivalent of physical possession. So far as can be ascertained, certainly in none of the classic cases decided either in the United States or in England, has such an issue been determined.

Of course, the courts of this country will not question the legality of the edict of a friendly foreign nation. Thus the legality of the decree of the Republic of Spain of Oc- [fol. 315] tober 10, 1936, wherein is set forth the confiscation of the steamship "Navemar" by the Spanish State, will be conceded. What the effect of such edict is on property seized beyond its domain and sovereignty is, of course, quite another matter. In United States v. Belmont, 85 Fed. (2d) 542, the Circuit Court of Appeals for this circuit held that with respect to property physically located within Russian territory,

"there can be no doubt that the decree of confiscation was effective to transfer title, and that after recognition of the Soviet Government by the executive branch of our own government, the courts of this country must enforce titles

and rights valid according to Russian law with respect to such property. * * * But the doctrine is otherwise with respect to property outside its own territory which a foreign state attempts to confiscate. Laws of foreign governments have extraterritorial effect only by comity and the public policy of the forum determines whether its courts will give effect to foreign legislation. It is very clear that it is contrary to the public policy of the state of New York to enforce confiscatory decrees with respect to property located here at the date of the decree. Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N. Y. 369; 378; 189 N. E. 456, 91 A. L. R. 1426; see, also, N. Y. Sess. Laws 1936, c. 917, adding Civil Practice Act, Sec. 977-b. The same general principle is recognized in Baglin v. Cusenier Co., 221 U. S. 580, 596, 31 S. Ct. 669, 55 L. Ed. 863. Also in England. Lecouturier v. Rey., L. R. 1910 A. C. 262, 265. This is likewise the view prevailing in most of the European countries. See authorities collected in 39 Yale L. J. 1130, 1153 et seq."

Now the case for the Republic of Spain is certainly no better than that of the Russian Government. On the con- [fol. 316] trary its position is if anything not nearly so tenable, for the facts disclose that disregarding the orderly processes of the local law, an attempt was made forcibly to seize property within the domain of the United States. It is extremely difficult to believe that the claim of immunity set up herein by the Spanish Consul General appearing for the Spanish Ambassador, can stem from any such acts. Certainly there is nothing set forth in the opinion of Chief Justice Marshall in The Exchange, 11 U. S. 116, wherein he reviews the circumstances out of which immunity might be asserted to cover a seizure within our own territorial limits.

Not only is there no support in precendent in circumstances such as are here disclosed, but there is none in reason or public policy. Baldly, the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. In all reason to answer to such question must be in the negative.

Moreover, the position of the present claim need not rest on such broad though controlling base. For the reasons set forth in the opinion denying the former application this application must also be denied. The steamship "Navemar" was not an armed vessel, was not a vessel in the public service of the Republic of Spain, was not possessed [fol. 317] by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer.

Finally it may be said that there is nothing in the treaty between Spain and the United States which warrants a seizure within the United States.

It is urged that the court should not assume jurisdiction because the libellant is an alien corporation, organized pursuant to the laws of the Republic of Spain. Proof, however, shows that this corporation was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States. In Russian Fleet v. United States, 282 U. S. 488, it is said:

"The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. Wong Wing v. United States, 163 U. S. 228, 238; compare Yick Wo v. Hopkins, 118 U. S. 356, [fol. 318] 369; Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394, 396; Truax v. Raich, 239 U. S. 33, 39; Terrace v. Thompson, 263 U. S. 197, 216; Home Insurance Co. v. Dick, 281 U. S. 397, 411."

The application is denied and this time without leave to renew, since it must be assumed all the facts have been fully presented.

Settle order on notice.

——, U. S. D. J.

[fol. 319] EXHIBIT "B"

Summary or Statement of the Facts Established by the Evidence at the Trial or Set Forth in the Two Applications Made to Vacate the Final Decree

In both the first and second applications to vacate, the final decree, it was alleged that on October 10, 1936, the Spanish Government at Madrid issued a decree purporting to confiscate the Spanish Steamship "Navemar". The evidence at the trial or hearing established that the "Navemar" was not at the time that alleged decree was issued within the territorial limits of Spain or its possessions, and had not since been within those limits. Her home port, where her title and bill of sale were registered, was Seville, which was then, and ever since has been in the armed occupation and control of a military force, holding adversely to the Government at Madrid. The evidence established that when the decree was allegedly issued, the "Navemar" was at Buenos Aires, about to load some general cargo there and a linseed cargo at Rosario for New York, the linseed being consigned to Archer-Daniels [fol. 320] Company, an American corporation, at its Edgewater, New Jersey, plant. The "Navemar" was in the New York to South American trade of the Compania Espanola de Navegacion Maritima, S. A., a Spanish corporation, which is now, and has been for several years, her duly registered owner, having acquired title by bill of sale for valuable consideration, and practically all of whose managing functions and corporate business have been transacted for several years—ever since it was incorporated—at 17 Battery Place, New York City, where Marcelino Garcia, Sr., its President and Director, has continuously had his office and done business. Mr. Garcia is a citizen of Spain, but has resided continuously for the last thirty-four years in Brooklyn, New York, and been doing business at 17 Battery Place, New York. He owns half of the stock in the appellee corporation, the other half being owned by Manuel Diaz, who is also a citizen of Spain, but who has resided continuously for more than twenty years in New York and been maintaining his office and doing business at 17 Battery Place.

The "Navemar" was under time charter (not expiring until June, 1937) to the Linea Sud-Americana, an American

corporation, which also has its principal place of business in New York.

The master of the "Navemar" while at Buenos Aires received a cable from the Director General of Marine at Madrid, informing him that the decree of confiscation had been issued. The Spanish Consul General at Buenos Aires, on being interviewed, told the master that he knew nothing of the matter and had no instructions. The "Navemar" then proceeded to Rosario to load the linseed part of the cargo. The Spanish Consul at Rosario, with whom the [fol. 321] ship's roll of the "Navemar" was temporarily deposited in ordinary course while in port by the master, the "Navemar" being a privately-owned and operated Spanish merchant vessel, also said on being interviewed by the master that he had no knowledge in the matter and had no instructions. After the linseed was loaded, and after the Consul's office at Rosario had closed for the day, the master of the "Navemar" was informed by the shippers that as the level of water in the river was going down it would be necessary to sail immediately for Buenos Aires to avoid a long delay at Rosario awaiting return of high water. The "Navemar" accordingly sailed at once for Buenos Aires, the master leaving instructions that the ship's roll should be obtained from the Spanish Consul and forwarded by mail to him at Buenos Aires. After the "Navemar" had sailed from Rosario, the Spanish Consul there received a cable, notifying him of the issuance of the decree in Madrid. The Consul thereupon made an endorsement on the ship's roll (which is the document showing the entrances and clearances and listing the crew and passengers), stating that the property in the vessel had passed to the Spanish Government by virtue of that decree. He then mailed the ship's roll to the Spanish Consul General at Buenos Aires, who before delivering it, demanded from the master the ship's register (which is the document showing the flag or nationality of the vessel) and then without authority or consent of the master or shipowners endorsed on the ship's register a statement that the property in the vessel had passed to the Spanish Government by virtue of the decree. The roll and register were thereupon delivered to the [fol. 322] master. The master of the "Navemar" thereupon interviewed the Spanish Consul at Buenos Aires regarding the endorsements, and informed him that the

"Navemar" was about to load general cargo and some more linseed at Buenos Aires for American consignees in New York under the time charter, and the Consul replied that he had no instructions, and suggested that the master notify Madrid by cable that he was sailing for New York, and the Consul said that he himself was cabling Madrid for instructions. No endorsement was made on the bill of sale or document of title of the vessel, and neither of the Spanish Consuls made any effort to put an officer or agent of the Spanish Government on board the ship, or otherwise take physical control or possession of her, or discharge the master or any of the crew from their shipping articles or contract of employment with appellee. Both Consuls having told the master that they had no instructions for him; and that they knew of no objection to his continuing with the voyage, he accordingly loaded the general cargo and remaining linseed and sailed for New York under the time charter to Linea Sud-Americana. The "Navemar" arrived at New York in November and discharged her cargo, the freight earned being collected and paid to the time charterer, and the time charterer notified the master that the "Navemar" should load a general cargo under the time charter for Buenos Aires. The master of the "Navemar" told the Spanish Consul at New York about the endorsements at Buenos Aires and Rosario and told him that no attempt had been made to take possession of the ship or to give him any instructions, and that the owner of the ship had instructed him that there was no legal authority for the Spanish Government attempting to take a vessel not in Spanish waters without her owner's consent, and that they would not consent to any transfer or con-
[fol. 323] fiscation. The Spanish Consul at New York first told him that he knew nothing of the matter and had no instructions, but to discharge the remainder of the cargo very slowly so that the Consul could get word or instructions in the matter from Madrid, but the master replied that he could not, and would not, do so as the vessel was under control to discharge as promptly as possible. Shortly afterwards on the master insisting that the Consul state definitely what he intended to do, as the vessel was about to finish discharging, and would then begin loading a general cargo for Buenos Aires under the time charter under her owner's instructions, the Consul called the Spanish Ambas-

sador at Washington on the telephone, and then on November 28, 1936, told the master that "from this date" the "Navemar" belonged to the Spanish Government and that he should obey his, the Consul's orders, and not the orders of the owner of the ship, and the master replied that he could not do so in view of his instructions from the owner of the ship to take orders only from its managing officers. The master then, on December 1, 1936, wrote a letter to the time charterer, reciting the endorsements made at Rosario and Buenos Aires, and the statements or contentions as made to him by the Spanish Consul at New York. Shortly afterward, early in December, and before actual loading began, the crew, other than the master and chief engineer, held a secret meeting on the ship and elected a committee of five members of the crew (Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez) for "anti-Fascist purposes" and to collect back to take charge of provisions and food for the crew. This committee began to assert greater authority, however, than was permitted to any labor organization or crew committee by the Spanish law, and, accordingly, the master took two of the committee ashore to the Spanish Consul General at New [fol. 324] York to report the committee's exceeding its authority. Instead of upholding the master's authority, the Consul told the master that the crew did "all right" in asserting this unusual authority.

When the master then returned to the "Navemar" he learned that the other members of the committee had refused to permit workmen from Robins Dry Dock to make repairs on the vessel which he had ordered in accordance with instructions from the vessel's owner, and had restrained the chief engineer who was on board, from assisting the Robins Dry Dock workmen in connection with making the repairs. The members of the committee then informed the master that he would not be allowed to go ashore, but he got ashore in spite of their orders. The owners then filed a libel, in the United States District Court for the Eastern District of New York, and had process served, against the ship in rem and against the insubordinate members of the crew, charging insubordination and barratry, and demanding that the Court remove the insubordinate men from the ship and turn over possession to libellant, her owner.

The Court, after hearing the master and officers of the ship and her owner's President and managing officer, and the five members of the committee or insubordinate crew not appearing or presenting any defense, entered a final decree in favor of Compania Espanola de Navegacion Maritima, S. A., directing the Marshal to order the insubordinate members of the crew off the ship and turn the legal possession back to her owner. At the trial evidence had been introduced by libellant of further unlawful and insubordinate acts of restraint and force committed in New York [fol. 325] harbor by the said committee of libellant's employees toward the chief officer and the chief engineer and other lawful superiors of said committee. The evidence showed that everyone on board the "Navemar" was at all times under contract of employment or shipping articles as an employee of libellant; that no effort had ever been made by the Spanish Consul or anyone else to discharge any of the crew from the shipping articles; and that no officer, agent, or other representative of the Republic of Spain had ever presented any credentials to the person lawfully in charge of the "Navemar" or had ever come on board to take possession or control on behalf of the Republic of Spain.

The Spanish Consul (Luis Careaga) then, by Jesse L. Rosenberg, an American lawyer, purporting to act on behalf of Fernando de los Rios, the Spanish Ambassador at Washington, filed an application to vacate the decree and turn over the ship to the Spanish Ambassador. The Court denied the application on the ground that no meritorious defense was set forth. A second application was made by Careaga, also purportedly on behalf of the Spanish Ambassador, and was again denied, the Court filing an eighteen page opinion, holding that the attempt of the anti-Fascist and insubordinate members of the crew to wrest control of the vessel from her owner and apparently to turn her over to the Spanish Consul was illegal. The Court (Judge Galston) held that an act of seizure of the "Navemar" by force from her lawful master's and owner's (appellee's) possession had [fol. 326] been committed in New York harbor, within the Eastern District of New York, by members of her crew, and that the Spanish Consul's or Ambassador's claim being based on that illegal and forcible seizure in defiance of the

local law and courts, failed to constitute a meritorious defense, and that as it was conceded by the Consul's or Ambassador's proctor at the oral argument or hearing of the second application, that no possession prior to that illegal seizure in New York, excepting an alleged "constructive possession" was contended for, and as two full opportunities had been given by the Court to the Consul or Ambassador to present all the facts, and as the facts were now all before the Court, and failed to show facts sufficient to constitute possession by the Republic of Spain of the "Navemar" prior to that illegal seizure, the second application of the Consular Ambassador to vacate the final decree should be denied, and this time without leave to make any further application.

[fol. 327] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar", Libellant,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of Spain to the United States of America, Petitioner

STATE OF NEW YORK,
County of New York, ss:

Anthony Libersky, being duly sworn, deposes and says: That he is over twenty-one years of age and a clerk in the employ of Bigham, Englar, Jones & Houston, proctors for libellant-appellee herein; that about 6:55 o'clock in the afternoon on the 11th day of February, 1937, at No. 15 Park Row, Borough of Manhattan, City of New York, he served the annexed notice of motion of appellee to vacate order allowing appeal and to vacate restraining order, etc., upon Jesse L. Rosenberg, proctor for appellant herein, by depositing a true copy thereof, enclosed in a sealed wrapper, addressed to said Jesse L. Rosenberg, in his letter box, accessible from without his office, said Jesse L. Rosenberg's office not being open at the time.

[fol. 328] Deponent, thereafter at or about 7:05 o'clock, phoned said Jesse L. Rosenberg, at his home address, and

informed him that the above papers were served at his office and that the return date of said notice of motion was February 15th at 10:30 o'clock.

Anthony Libersky.

Sworn to before me this 13th day of February, 1937. Edward A. Quinlan, Notary Public, Kings County No. 1. Kings County Register's No. 8080. N. Y. Co. Clk's No. 2, Reg. No. 8Q1. Commission expires March 30, 1938. (Seal.)

[fol. 329] [Endorsed:] 14708. In the United States Circuit Court of Appeals for the Second Circuit. Compania Espanola de Navagacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Libellant-Appellee, against Spanish Steamship "Navemar", her engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of the Republic of Spain to the United States of America, Petitioner-Appellant. Motion of Appellee to Vacate Order Allowing Appeal and to Vacate Restraining Order, etc. Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellee, 99 John Street, New York City.

(1) Motion granted to dismiss appeal from decree for possession of December 14, 1936.

(2) Motion granted to dismiss appeal from order of January 4, 1937 conditionally denying intervention.

(3) Motion denied to dismiss appeal from order of February 3, 1937 unconditionally denying intervention.

(4) Marshal stayed without security from delivering possession to the Libellant under decree of December 14, 1936, or otherwise.

(5) Libellant stayed without security from removing ship from jurisdiction of District Court.

(6) Stay vacated as against Libellants in suits upon maritime liens without prejudice to the right of the ambassador to apply in the District Court in those suits to intervene and to stay proceedings during pendency of those suits.

[fol. 330] Office Copy, Do Not Remove From File, B. E. & J.

At a stated term of the United States Circuit Court of Appeals for the second circuit, held in the Court Rooms thereof United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 4th day of March, 1937.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

Compania Espanola de Navegacion Maritima S. A., Owner of the Spanish Steamship Navemar, Libelant,

against

Spanish Steamship Navemar, Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner

Petitioner, Fernando de los Rios, Ambassador of Spain to the United States of America, having appealed to this court from the final decree of the United States District Court for the Eastern District of New York, entered on the 14th day of December, 1936, and from the order of the United States District Court for the Eastern District of New York, entered on the 4th day of January, 1937, conditionally denying intervention to said petitioner, and from the order of the United States District Court for the Eastern District of New York entered on the 3rd day of February, 1937, unconditionally denying intervention to said peti-
[fol. 331] tioner, and an order restraining all persons from removing the S/S. Navemar from the possession of the United States Marshal for the Eastern District of New York having been entered in this court on the 3rd day of February, 1937, and libellant Compania Espanola de Navegacion Maritima, S. A., having moved to dismiss the appeal herein and to vacate the said restraining order, and the motion having duly come on to be heard, and having been argued by the advocates for the respective parties, and due deliberation having been had, and the court having filed its opinion in writing, it is

Now, by this Court

Ordered that the appeal from the final decree of the United States District Court for the Eastern District of

New York, entered on the 14th day of December, 1936, be and the same hereby is dismissed, and it is further

Ordered that the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 4th day of January, 1937, conditionally denying intervention, be and the same hereby is dismissed, and it is further

Ordered that the motion to dismiss the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 3rd day of February, 1937, unconditionally denying intervention, be and the same hereby is denied, and it is further

Ordered that the United States Marshal for the Eastern District of New York, be stayed without security from delivering possession of the S/S. Navemar to the libellant under the aforesaid decree of December 14th, 1936, or otherwise, and it is further

Ordered that the libellant Compania Espanola de Nave- [fol. 332] gacion Maritima, S. A. be stayed without security from removing the S/S. Navemar from the jurisdiction of the United States District Court for the Eastern District of New York, and it is further

Ordered that the stay heretofore granted by this Court by order dated February 3rd, 1937 be and the same hereby is vacated as against libellants in suits upon maritime liens without prejudice to the right of the petitioner, Fernando de los Rios, Ambassador of Spain to the United States, to apply in the United States District Court for the Eastern District of New York to intervene in said suits and to stay proceedings during pendency of those suits.

Wm. Parkin, Clerk. ——, U. S. C. J.

Filed Mar. 4, 1937.

[fol. 332½] Sir:

Please take notice that the within Order will be presented for settlement and signature at the office of the Clerk of this Court in the United States Court House Borough of Manhattan City of New York, on the 3rd day of March, 1937, at 2:30 P. M.

Dated March 1, 1937.

Lynch, Hagen & Atkins, for ——, 111 John Street, New York, N. Y.

[Endorsed:] United States Circuit Court, Second Circuit. Compania Espanola de Navegacion Maritimia, S. A., owner of the Spanish Steamship Navemar, Libelant, vs. S/S. Navemar, her engines, etc., et al., Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner. Order with Notice of Settlement. Jesse L. Rosenberg and Lynch, Hagen & Atkins, Proctors for Petitioner, 111 John Street, Borough of Manhattan, New York City. Copy received Mar. 1, 1937. Bigham, Engler, Jones & Houston.

[fol. 333] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Libelant-Appellee,

against

Spanish Steamship "NAVEMAR", and against RAFAEL CRESPO, Jose Arana, Manuel Freire, Gaspar Lopez, and, Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of Spain to the United States of America, Petitioner-Appellant

SIRS:

Please take notice that on the affidavits of Charles W. Hagen and Winifred See, verified the 3rd day of March, 1937, and on all the proceedings heretofore had herein, the undersigned, proctors for Luis Careaga, Acting Consul General of Spain, will apply to this Court at a stated term for the hearing of motions, at the Court Room thereof in the Federal Court House, Foley Square New York City, at 10:30 A. M. on the 8th day of March, 1937, or as soon thereafter as counsel can be heard, for the allowance of an appeal from the final decree heretofore entered herein on the 14th day of December, 1936, and for an order directing that the Notice of Special Appearance of Luis Careaga, Notice of Appeal and Assignment of Errors be included in the printed record on appeal about to be filed on behalf of Fernando de los Rios, petitioner-appellant in the above entitled proceed-

ing, and for such other and further relief as the Court may deem appropriate.

Dated, New York, N. Y., March 3rd, 1937.

Yours, &c., Jesse L. Rosenberg, Lynch, Hagen & Atkins, Proctors for Petitioner-Appellant, 111 John Street, New York.

[fol. 334] To Bigham, Englar, Jones & Houston, Proctors for Libelant-Appellee, 99 John Street, New York; William Parkin Esq., Clerk.

[fol. 335] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Libelant-Appellee,

against

Spanish Steamship "NAVEMAR", and against RAFAEL CRESPO, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of Spain to the United States of America, Petitioner-Appellant

STATE OF NEW YORK,
County of New York, ss:

Charles W. Hagen, being duly sworn, deposes and says:

On the 7th day of December, 1936, a possessory libel was filed in the United States District Court for the Eastern District of New York, by Compania Espanola De Navegacion Maritima, S. A., a Spanish corporation, owner of the Spanish steamship Navemar, against the said steamship Navemar and against certain members of the crew of said steamship. In said libel it is alleged that in the month of October, 1936, while the master and officers and crew of said steamship Navemar were on board the vessel, five members of the crew "wrongfully, unlawfully and forcibly deprived libelant of possession of said steamship, and have since continuously withheld her from libelant by unlawfully and forcibly seizing, asserting and exercising exclusive control over said steamship Navemar, contrary to libellant's interest and instructions".

The libel further alleges that the aforesaid seizure and withholding of said steamship from the libelant was not done in accordance with any authority conferred on said [fol. 336] crew or respondents by law, or by the libelant; that the said five members of the crew refused to permit the master to continue command of the steamship and that they have further wrongfully and unlawfully continued to exercise control by maintaining a guard on the steamship to prevent libelant from resuming possession of her.

Process under said libel was returnable on December 9th, 1936.

On the return date, Jesse L. Rosenberg appeared and entered on the record, his special appearance on behalf of Luis Careaga, Acting Consul General of Spain, "solely for the purpose of contesting the jurisdiction of this Honorable Court, and for the purpose of obtaining an extension of time so as to enable the said Luis Careaga to communicate with the Honorable the Ambassador of Spain, duly accredited to the United States of America and now in Washington, D. C., and with the Honorable the Secretary of State of the United States of America, and that the said Luis Careaga does not appear generally in this action" (S. M. page 2).

A typewritten notice of Special Appearance which had been served on counsel for the libelant was tendered to the Court and the Court said: "You will have to file it with the Clerk of the Court" (p. 12). Thereafter Mr. Percy G. B. Gilkes, Clerk of the Court, refused to permit the filing of this notice of Special Appearance, as appears from the affidavit of Winifred See, hereto annexed.

Despite the Special Appearance referred to above, the District Court refused to permit counsel to argue or to take any part in the proceedings or to state the reasons for objecting to the jurisdiction of the Court (S. M. pp. 108, 109).

The libel in this case relates at least in part to a dispute between the officers and five members of the crew of the S/S. Navemar. Sections 256 and 257, Title 22 U. S. C. A., [fol. 337] provide that controversies between the officers and crew of a foreign vessel shall be exclusively within the jurisdiction of the Consul of the nation to which the vessel belongs, and that the courts of the United States shall take no jurisdiction of such controversies unless such Consul applies in writing to the Courts of this country. The treaty between Spain and the United States, Section XXIII contains a similar provision. It was for this reason that Luis

Careaga, Acting Consul General of Spain, objected to the jurisdiction of the United States District Court and filed a Special Appearance. The Acting Consul General of Spain, Luis Careaga, having filed a Special Appearance, was a party to the proceedings before the entry of the final decree and therefore is entitled to appeal from the decision of the District Court, insofar as the jurisdiction of the Court is concerned.

This Court has heretofore allowed an appeal to Fernando de los Rios, Ambassador of Spain, from an order denying his application to intervene in the District Court, and has dismissed his appeal from the final decree to which he was not a party. The situation as to the Consul differs from that of the Ambassador, as appears from the foregoing statement of facts.

Honorable Clarence G. Galston, United States District Judge, has heretofore indicated that Luis Careaga was not a party to these proceedings (1937 A. M. C. 22; 1937 A. M. C. 26), and the Clerk has heretofore refused to accept papers which we endeavored to file on Careaga's behalf. It is for this reason that application is being made to this Court and not to the District Court for the allowance of an appeal by Luis Careaga, as Acting Consul General of Spain.

[fol. 338] Deponent further asks that the Court direct that the necessary papers relating to this appeal by Luis Careaga, consisting of the Notice of Appeal, Allowance of Appeal, Notice of Appeal and Assignment of Errors, be included in the printed record on appeal about to be filed in this case by the petitioner-appellant, the Ambassador of the Republic of Spain.

Charles W. Hagen.

Sworn to before me this 3rd day of March, 1937. Henry O. Eidenbach, Notary Public, Bronx County. Bronx Co. Clks. No. 60 Reg. No. 60E37. N. Y. Co. Clks. No. 297 Reg. No. 7E198. Commission Expires March 30, 1937. (Seal.)

[fol. 339] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A.,
Libelant-Appellee,

against

Spanish Steamship "NAVEMAR", and against RAFAEL CRESPO, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Ambassador of Spain to the United States of America, Petitioner-Appellant.

STATE OF NEW YORK,
County of New York, ss:

Winifred See, being duly sworn, deposes and says:

I am clerk in the office of Lynch, Hagen & Atkins, associated as counsel for the Acting Consul General of Spain.

On the 10th day of December, 1936, I proceeded to the office of the Clerk of the United States District Court for the Eastern District of New York, and endeavored to file the notice of Special Appearance of Luis Careaga, a copy of which is hereto annexed.

Mr. Percy G. B. Gilkes, Clerk of the United States District Court for the Eastern District of New York refused to permit me to file this Notice of Appearance and stated that he could not recognize Luis Careaga, the Spanish Consul, since he was not a party to these proceedings and had no standing in Court. Therefore no papers on his behalf could be filed.

Winifred See.

Sworn to before me this 3rd day of March, 1937. Henry C. Eidenbach, Notary Public, Bronx County. Bronx Co. Clks. No. 60 Reg. No. 60E37. N. Y. Co. Clks. No. 297 Reg. No. 7E198. Commission Expires March 30, 1937. (Seal.)

[fol. 340] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

15102

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship Navemar, Libelant,

against

Spanish Steamship NAVEMAR, Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents

SIRS:

Please Take Notice that the undersigned on behalf of Luis Careaga, Acting Consul General of Spain, appears herein specially solely for the purpose of contesting the jurisdiction of this Honorable Court and for the purpose of obtaining an extension of time sufficient to enable the said Luis Careaga to communicate with the Honorable the Ambassador of Spain duly accredited to the United States of America and now in Washington, D. C., and with the Honorable the Secretary of State of the United States of America, and that the said Luis Careaga does not appear generally in this action.

Dated, New York, N. Y., December 9th, 1936.

Yours &c., Jesse Rosenberg, Attorney for Luis Careaga, Office and P. O. Address, 15 Park Row, Borough of Manhattan, City of New York.

To Percy G. B. Gilkes, Esq., Clerk; Messrs. Bigham, Englar, Jones & Houston, Proctors for Libelant, 99 John Street, New York.

[fol. 341] [Endorsed:] United States Circuit Court, Second Circuit. Compania Espanola de Navegacion Maritima, S. A., Libelant-Appellee, vs. S/S. Navemar et al., Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant. (Copy.) Motion for allowance of appeal and affidavits. Jesse L. Rosenberg, Lynch, Hagen & Atkins, Proctors for Petitioner, 111 John Street, Borough of Manhattan, New York City.

Motion for leave to appeal is denied.

M. T. M. L. H. T. W. S.

March 10/37.

[fol. 342] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship, "Navemar", Libellant,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner

STATE OF NEW YORK,
County of New York, ss:

T. Catesby Jones, being duly sworn, deposes and says:

That he is an attorney at law, duly admitted to practice in this court, and a member of the firm of Bigham, Englar, Jones & Houston, proctors for Compania Espanola de Navegacion Maritima, S. A., the libellant appellee herein.

The motion made in this cause by proctors for Luis Careaga, Acting Consul General of Spain, asks for:

(1) "An allowance of an appeal from the final decree heretofore entered herein on the 14th day of December, 1936," and

[fol. 343] (2) "For an order directing that the notice of Special Appearance of Luis Careaga, Notice of Appeal and Assignment of Errors be included in the printed record of appeal, etc."

The application is made on behalf of a Consul General and therefore has no relation to any immunity of the "Navemar" from process of the Court. In The Sao Vicente, 260 U. S. 151, 155, the following passage from the opinion of Mr. Justice Story in The Anne, 3 Wheaton (U. S.) 435, 445, was quoted with approval:

"And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his

sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought *to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case;* and therefore, we consider this claim as asserted by an *incompetent person,* and on that ground, it ought to be dismissed."

[fol. 344] Furthermore, the application is made on behalf of a person not a party to the suit herein. In Ex parte Cutting, 94 U. S. 14, the Supreme Court said (pp. 20 to 22):

"They filed their petition to be made defendants in the suit, but it was never granted. Not only was no express order made to that effect, but there is nothing to show that they were ever in any manner recognized as parties, or that they ever supposed they were parties.

* * * From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here.

* * * *Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appear as actual parties to the suit before the decree."*

In Guion v. Liverpool Ins. Co., 109 U. S. 173, the Supreme Court said:

"The petition of Guion was for leave to appeal from a decree in a suit to which he was not a party. We decided

in Ex parte Cutting, 94 U. S. 14, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given."

[fol. 345] (1) With respect to the right of Careaga to appeal:

It follows from the authorities cited above that the application, if it relates to a plea of immunity, must fail. Petitioner's supporting affidavit of Mr. Hagen, sworn to on the 2nd day of March, 1937, shows that petitioner recognizes this, because it alleges as the ground for granting the motion that the suit at bar relates to a dispute between the officers and members of the crew of the "Navemar". Nothing, however, in the affidavit of Mr. Hagen, nor in the Record, even indicates that Mr. Careaga offered to appear in respect of any such dispute. Mr. Hagen refers to several passages from the Record, but the Record at neither of these places makes any mention of a dispute between the officers and the crew. An examination of the passages of the Record cited by Mr. Hagen shows the following:

(a) S. M. page 2—Here a long colloquy followed which is contained in typed S. M. pages 2 to 12. Mr. Hagen in his affidavit deals with the quotation from S. M. page 2 and that from S. M. page 12 as though they were not part and parcel of the same thing. A mere casual reading of the Trial Minutes shows the contrary. The Court showed every evidence of consideration for counsel for Careaga and the only thing the Court said concerning the appearance was that it must be filed with the Clerk. Clearly no exception can be taken to the Court's position that if an appearance is to be entered it must be filed with the Clerk. Moreover, from the record and from Mr. Hagen's affidavit, the full alleged appearance was never submitted to the Court's attention.

[fol. 346] (b) The reference at S. M. pages 108, 109, referred to in Mr. Hagen's affidavit, merely shows that the Trial Court called attention to the fact that no appearance had been filed.

(2) With respect to the effort to file the alleged notice of appearance with the Clerk.

(a) The alleged notice of appearance, which it is alleged in Mr. Hagen's affidavit that Mr. Careaga was not permitted

to file, is not annexed to the moving papers. All that appears from them is an excerpt from it which is quoted in Mr. Hagen's affidavit.

(b) The moving papers do not show that any record was made of the alleged refusal of the Clerk to receive said appearance.

(c) The moving papers do not show that an exception was taken to the refusal of the Clerk to receive such appearance, nor do the said papers show that the alleged refusal or the Clerk's reasons for such refusal were at any time called to the attention of the Trial Court.

The only reference in the Trial Minutes as to the Treaty between the United States and Spain appears at S. M. pp. 132-134. It there appears that a Mr. McDonald, counsel representing the crew of the "Navemar", declared that Mr. Careaga was in court and that Mr. Careaga would be glad to state his position to the Court. Thereupon the Court stated that Mr. Careaga should be called as a witness. This was not done, because Mr. Careaga insisted upon "a private hearing" (S. M. p. 133). No exception was taken to this ruling of the court.

[fol. 347] Furthermore, the seamen who brought suit against the libellant, as well as all of the members of the crew, have been paid their wages in full by the libellant, the appellee here, and no further claim is asserted by these seamen for wages or otherwise against the libellant-appellee, Compania Espanola de Navegacion Maritima, S. A., or the Steamship "Navemar", nor against the officers of the "Navemar". The wages were paid in full up to and including December 16, 1936.

It thus appears that Careaga failed to make any record of any of the presently alleged errors of the Court below, particularly in respect of the alleged refusal of the Clerk to permit him to file an appearance. Careaga also failed to make any record concerning the action of the Clerk, and particularly concerning the action of the Clerk in refusing to receive the alleged notice of appearance. A careful examination of the record as well as of the moving papers fails to disclose that any exception was taken by Careaga to any of the rulings below. So far as deponent has been able to ascertain, Careaga offered through a Mr. McDonald, who appeared for the seamen, to testify provided the Court would give him "a private hearing" (S. M. 133). No ex-

ception was taken to the ruling of the court refusing to take evidence at a private hearing.

For the foregoing reasons, deponent submits that it would be highly improper for any order to be entered directing that the notice of appearance of Luis Careaga and notice of appeal and assignments of error should be included in the printed record.

Exhibit "A" annexed hereto is a copy of the Court order dated February 4, 1937 in the suit of the seamen, Manuel [fol. 348] Freire, Rafael Crespo, et al., against the Steamship "Navemar" and Compania Espanola de Navegacion Maritima, S. A., in the United States District Court for the Eastern District of New York awarding said seamen their wages in full to and including the 16th day of December, 1936, with transportation back to Spain; and Exhibit "B", annexed hereto, is a copy of the order of the Court dated February 4, 1937, showing that the decree, Exhibit "A", has been fully satisfied. Deponent alleges that any dispute which heretofore existed between the officers and members of the crew of the "Navemar" was terminated by said orders, Exhibits "A" and "B" hereto.

Wherefore, deponent prays that the motion made by the proctors for the petitioner, Luis Careaga, Acting Consul General of Spain, be denied in both of its aspects.

T. Catesby Jones.

Sworn to before me this 8th day of March, 1937. Edward A. Quinlan, Notary Public, Kings County No. 1. Kings County Register's No. 8080. N. Y. Co. Clk's No. 2, Reg. No. 8Q1. Commission expires March 30, 1938. (Seal.)

[fol. 349] EXHIBIT "A"

At a Stated Term of the District Court of the United States for the Eastern District of New York, held in the Court Rooms thereof in the United States Court House, Borough of Brooklyn, City, State and Eastern District of New York, on the 4th day of February, 1937.

Present: Honorable Robert A. Inch, United States District Judge.

In Admiralty. No. 15106

MANUEL FREIRE, RAFAEL CRESPO, JOSE ARANA, ANGEL VALDES, Gonzalo Atares, Manuel Alonso, Angel Barrenechea, Francisco Riveiro, Nicomedes Llanos, Higinio Blanco, Francisco Dominiguez, Eusebio Bilbao, Jesus Alvarez, Jose Lopez, Arturo Garcia, Honorio Escudero, Federico Albaniga, Gaspar Lopez, Hermenigildo Lorono, Jose Leston, Alejandro Barturen, Antonio Abellon, Francisco Hormaechea, Felix Anitua, Antonio Sanchez, Manuel Silva, Salustiano Beivide, Rufino Armaolea, and Juan Perez, Members of the Crew of the S/S. "Navemar", Libellants,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., Compania Espanola de Navegacion Maritima, S. A., Owner and Claimant.

Final Decree

On motion of Thomas A. McDonald, Esquire, proctor for libellants, for entry of a final decree herein in accordance with the admissions in the Second Amended Answer filed by claimant herein, and on the subjoined consent of Messrs. Bigham, Englar, Jones & Houston, proctors for Compania Espanola de Navegacion Maritima, S. A., owner and claimant of the S/S. "Navemar"; and it appearing to the Court [fol. 350] that the total wages and moneys earned by libellants for their services in said claimant's employment on board the S/S. "Navemar" to and including the 16th day of December, 1936, amount, with costs, and less advance payments, to the sum of $3,525.00; and it appearing to the Court that the claimant has further offered to provide tickets for the transportation of libellants to Barcelona, Spain; and other good cause appearing thereof;

It is hereby ordered, adjudged and decreed that libellants recover of and from the Spanish S/S. "Navemar" and from Compania Espanola de Navegacion Maritima, S. A., claimant and owner of the said steamship, the sum of $3,525.00 together with said tickets for transportation of libellants to Barcelona, Spain.

It is ordered that the Clerk of this Court pay to Thomas A. McDonald, proctor for libellants, out of the Registry of

this Court, $3,525.00 less his fees, and deliver to him the tickets deposited, and that the Clerk return to claimant the sum tendered in excess of the above amount.

Robert A. Inch, United States District Judge.

We hereby consent to the signing and entry of the foregoing final decree.

Bigham, Englar, Jones & Houston, Proctors for Compania Espanola de Navegacion Maritima, S. A., owner and claimant of Spanish Steamship "Navemar". Thomas A. McDonald, Proctor for Libellants.

[fol. 351] EXHIBIT "B"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

MANUEL FREIRE, RAFAEL CRESPO, JOSE ARANA, ANGEL VALDES, Gonzalo Atares, Manuel Alonso, Angel Barrenechea, Francisco Riveiro, Nicomedes Llanos, Higinio Blanco, Francisco Dominiguez, Eusebio Bilbao, Jesus Alvarez, Jose Lopez, Arturo Garcia, Honorio Escudero, Federico Albaniga, Gaspar Lopez, Hermenigildo Lorono, Jose Leston, Alejandro Barturen, Antonio Abellon, Francisco Hormaechea, Feliz Anitua, Antonio Sanchez, Manuel Silva, Salustiano Beivide, Rufino Armaolea, and Juan Perez, Members of the Crew of the S/S. "Navemar", Libellants,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., Compania Espanola de Navigacion Maritima S. A., Owner and Claimant

On the annexed consent, and on motion of Bigham, Englar, Jones and Houston, proctors for claimant, it is

Ordered that all decrees heretofore entered herein be and the same hereby are marked satisfied of record and that all bonds and stipulations filed by and on behalf of any of the parties to this action be and the same are hereby marked cancelled and discharged of record and all process heretofore issued herein be and the same hereby is vacated. Dated, New York, February 4, 1937.

Percy G. B. Gilkes, Clerk.

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Consent

Consent is hereby given to the entry of the foregoing order.

Thomas A. McDonald, Proctor for Libellants. B. E. J. & H.

Dated, New York, February 4, 1937.

[fol. 351½] [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Libellant, against Spanish Steamship "Navemar", her engines, etc., and Rafael Crespo, et al., Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner. (Copy.) Affidavit in opposition to motion for allowance of appeal from final decree. Bigham, Englar, Jones & Houston, Proctors for Libellant Appellee, 99 John Street, New York City.

[fol. 352] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of March, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Libellant-Appellee,

vs.

S/S. NAVEMAR and RAFAEL CRESPO, et al., Respondents; Fernando de los Rios, Ambassador of Spain to the United States, Petitioner-Appellant

A motion having been made herein by counsel for the Petitioner-Appellant for the allowance of an appeal from the final decree entered herein on December 14, 1936; and for other relief;

Upon consideration thereof it is

Ordered that said motion be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 353] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compania Espanola de Navegacion Maritima, S. A., vs. S/S. Navemar et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 18, 1937. William Parkin, Clerk.

[fol. 354] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar", Libellant-Appellee,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez, and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Appellant

Before Manton, Hand and Hand, Circuit Judges

Appeal from the District Court for the Eastern District of New York

A possessory libel was filed by the Compania Espanola de Navegacion Maritima, S. A., owner of the Spanish Steamship "Navemar", against the Steamship "Navemar", her engines, etc. and Rafael Crespo et al., for possession of the vessel. Decree for libellant; Fernando de los Rios, Spanish Ambassador to the United States of America, appeals. Decree reversed.

Lynch, Hagen & Atkins, Proctors for Fernando de los Rios, Ambassador of Spain to the United States. Charles W. Hagen, Jesse E. Rosenberg, Henry C. Eidenbach, John S. Bull, Advocates.

Bingham, Englar, Jones & Houston, Proctors for Libellant-Appellee. James W. Ryan, T. Catesby Jones, Advocates.

[fol. 355] MANTON, Circuit Judge:

The Compania Espanola de Navegacion Maritima, S. A. is a corporation organized and existing under the laws of

Spain. On October 10, 1936 it was the owner and operator of the S/S. Navemar which plied between Spain, New York and ports in South America. On that date, while she was in the port of Buenos Aires, Argentine, a decree was issued by the Spanish Government attaching the Navemar and declaring her to be in the service of the Spanish Government subject to management by the Ministry of Communication and Merchant Marine. The decree further provided that it was to be in force as a law of that country upon its publication in the "Gaceta de Madrid", which was done October 11, 1936, and that a notation of the attachment should be made on the documents of the vessel and on the Consular Registries. The master of the Navemar received a cablegram from the Spanish authorities October 16, 1936, informing him of the expropriation or attachment of the vessel and directing him to report and place himself at the disposal of the Spanish Consul; he did so but, not having received instructions, sailed on the same day for Rosario, Argentine, where he loaded a cargo of linseed consigned to an American corporation. He deposited the ship's roll with the Spanish Consul at Rosario, and was forced to leave without it because of a sudden notice of impending low water. Having returned to Buenos Aires, the vessel was loaded with an additional cargo of linseed and with 2200 tons of general cargo sent by private shippers to private consignees. The Consul at Buenos Aires delivered to the master the ship's registry and roll, which had been forwarded by the Consul at Rosario, each of which bore [fol. 356] a similar endorsement to the effect that the vessel had become the property of the Spanish Government. The endorsement on the registry read:

"By cable dated the 15th of October, 1936, the Spanish Embassy at this Capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazete on the date of the 11th of the present month."

The Consul at Buenos Aires told the master to continue his voyage since no instructions had been received from the Spanish Government but he was advised to cable the Director of Navigation, whereupon the following message was sent:

"'Authorized by Consul General we sail for New York Greetings signed Master, 'Navemar'."

After arival in New York, November 25, 1936, and discharge of part of the cargo in Brooklyn, the vessel moved to a pier at Edgewater, N. J., on November 30, where the discharging of the cargo was completed December 1, 1936. Freight was earned and was payable to Linea Sud Americana Inc., time charterer of the Navemar with six months to run on its charter. Garcia & Diaz, as agents of the charterer, collected the freight money prior to delivery to the consignees. Upon arrival in New York, the master deposited the ship's roll with the Consul General in New York and called his attention to the endorsement which it bore. After communication with the Spanish Ambassador at Washington, the Consul delivered to the master a letter dated November 28, 1936, reading:

"The ship of your command is from this date at the disposition of the Republic * * *."

[fol. 357] The master was requested to present a detailed account of the expenses of the Navemar.

The master also presented himself at the office of Garcia & Diaz, agents for the appellee, and was ordered to proceed with the discharging of cargo and to prepare for another voyage to Buenos Aires in accordance with the charter.

While the Navemar was at its pier in Edgewater, N. J. December 1, 1936, five members of the crew representing themselves to be a duly elected committee, claimed authority to take charge of the provisions and pay of the crew. On December 2 the Navemar proceeded to anchorage grounds in Red Hook Flats, Brooklyn, to undergo repairs pursuant to instructions by the appellee. The Consul in New York, on December 2, 1936, advanced $300. to the master to care for the expenses of the Navemar. The master reported the activities of the committee to the Consul and was told that they met with his approval. December 7, 1936 the Consul appointed a new master to relieve the former one of his command. Meanwhile the crew, aided by the committee and instigated by the Consul, continued to assert authority over the Navemar, interfering with the making of repairs and seeking to prevent the master from going ashore.

This possessory libel was thereupon filed by the appellee, process being served December 7, 1936, on the vessel and on each of the members of the committee. No general or special appearance was entered by the respondents. On

December 14, 1936, hearings having been held, the court entered a default decree holding that the appellee was the owner of the vessel and entitled to its possession. The decree was executed and possession delivered as directed.
[fol. 358] The Consul, appearing specially on December 16, 1936, made an application to have the final decree vacated and to be permitted to file a suggestion, claiming immunity of the Navemar from jurisdiction, and to intervene in the suit on behalf of the Spanish Ambassador. The application was denied though leave to renew was granted. Thereafter, on January 8, 1937, a supplemental suggestion was filed by the Consul appearing on behalf of the Ambassador and a final order was entered February 3, 1937 denying the motion to intervene and to assert the claim of the Spanish Government. From this order the Ambassador appeals.

In filing the suggestion through the Consul as his agent and in seeking to intervene in the suit, the Ambassador followed a permissible and adequate procedure distinguishable from that which was held insufficient in United States v. Pesaro (255 U. S. 216) and Ex parte Muir (254 U. S. 522). In the Pesaro case, a direct suggestion of immunity by the Italian Ambassador was deemed inadequate, the court pointing out that no intention was revealed by the Ambassador "to put himself or the Italian Government in the attitude of a suitor". In these circumstances mediation through the official channels of the United States was stated to be a proper method, though it was not held to be an exclusive one. Here the Consul, appearing as a duly appointed agent of his Government [compare, The Anne, 3 Wheat. 434; The Sao Vicente, 260 U. S. 146] filed the suggestion of immunity and the Ambassador had asked to intervene specially as a party to the proceedings, seeking, therefore, as a suitor to assert his Government's claim to the Navemar. Obviously, this is not merely a "respectful [fol. 359] suggestion" inviting the court to give it effect—which was the court's description of the procedure followed in the Pesaro case.

In the suggestion filed on behalf of the Ambassador, it is stated that in accordance with the decree of October 10, 1936, the Consul General at Rosario

"pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the * * * Navemar in the name of the Republic of Spain * * *

whereby * * * the Navemar then and there became and at all times has remained the property of the Government of the Republic of Spain."

It is also alleged that since no consent has been given by the Spanish Government, the Navemar was immune from arrest and from judicial process.

Jurisdiction to entertain this suit is challenged because (1) by virtue of Art. XXIII, of the Treaty between Spain and the United States matters relating to the "internal order of merchant vessels" and to "differences which may arise either at sea or in port between captains, officers and crews" are placed within the cognizance of the Consuls of the respective nations; and (2) that the Navemar being a public vessel of the Spanish Government is immune from judicial process. The first ground may be dismissed with the observation that the issue in this case is one of title or ownership to the Navemar and not the mere settlement or adjustment of internal differences on the vessel. The second objection requires consideration.

The development in this country of the doctrine of immunity of foreign vessels stems from The Exchange, 7 Cranch. 116. The question there presented was whether [fol. 360] a French war vessel was subject to the jurisdiction of our courts. It was held not to be upon the principle that a ship of a foreign friendly nation which constitutes a part of its military force, which is under the command of the sovereign and which is employed for obviously national purposes, should not be subject in invitum to interference by our courts. That was thought necessary if the sovereignty of a foreign friendly government was to be adequately and fully recognized. Where the vessel is one of war, all the elements of ownership, possession and direct operation by the foreign government are combined, and the national or public character of its functions is indisputable. But the notion of a public purpose has been extended and immunity granted though the vessel is commercially engaged. Berrizi Bros. v. Pesaro, 271 U. S. 562; Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219; The Maipo, 252 Fed. 627 (D. N. Y.). In the Pesaro case the vessel was owned, possessed and operated by the Italian Government in the carriage of merchandise for hire. The advancement of trade and the acquisition of revenue incident to participation in commercial

services was deemed a sufficient public purpose. In England, the trend has been liberal [The Jassy (1906) P. 230; The Porto Alexandre (1920) P. 30] and the entire doctrine of immunity has been influenced by the theory that an action against the foreign vessel is not only in rem but also in personam against the foreign sovereign. The Parlement Belge, 5 P. D. 197. Inability to implead the foreign sovereign is singularly emphasized in The Jupiter (1924) P. 236.

One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day [fol. 361] is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flys and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. U. S. v. Rodgers, 150 U. S. 249; The Scotland, 105 U. S. 27; Wilson v. McNamee, 102 U. S. 574; Crapo v. Kelly, 83 U. S. 610; E. B. Ward Jr, 17 Fed. 456 (C. C. La.).

If we concede, as we must, that the Spanish Government possesses, as an incident to sovereignty, the right, exercisable as to property within its jurisdiction, of appropriating private property to public uses when the exigencies of public welfare demand it [U. S. v. Belmont, decided by the Sup. Ct. May 3, 1937; Ricand v. Amer. Metal Co., supra; Luther v. Sagor (1921) 3 K. B. 532; Wheaton, Internatl. Law, 6th English Ed. 1929, p. 335] then the right to issue its decree of expropriation on October 10, 1936 must be admitted. The Navemar was subject to the governmental decree.

The claim of this public control is borne out by the Ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive. Oetjen v. Central Leather Co., 246 U. S. 297; Ricaud v. Amer. Metal Co., supra; The Adriatic, 258 Fed. 902 (CCA. 3). It is not for us to examine the propriety or to determine the validity of the decree affecting property within the foreign sovereign's dominion. If by any misadventure the authorized representative of a foreign state should make an unfounded suggestion, the proper remedy would be through diplomatic channels between the two sovereigns and not by legal proceedings against an independ- [fol. 362] ent sovereign or its property.

The modern state has found it necessary—for reasons entirely foreign to judicial inquiry—to widen the range of its operations, and to embrace enterprises essentially nongovernmenta, in character. The purpose to which a foreign vessel is dedicated may bear upon its immunity from judicial process. Berizzi Bros. Co. v. Pesaro, supra; Briggs v. Light Boats, 11 Allen (Mass.) 157; Hyde, International Law, Vol. 1, § 256. Actually, as to a vessel possessed—though constructively—and controlled by a foreign sovereign, the government is left by general public law at liberty to determine for itself what functions are of a governmental and what of a private nature; and the conclusions of the foreign sovereign or state in that regard are outside the scope of judicial determination in the courts of another state. The Adriatic, supra; The Roseric, 254 Fed. 154 (D. N. J.); The Parlement Belge, supra; See, Note, 31 Columbia Law Review, 660, 662.

Having dedicated the vessel to the public service by subjecting it to its control, the Spanish Government must be regarded as at least in constructive possession of her which, for purposes of immunity, is as efficacious as actual possession asserted through the Government's own officers. The Roseric, supra; The Adriatic, supra; The Jupiter [1924] P. 236; Hyde, supra § 256; Contra, The Attualita, 238 Fed. 909 (CCA. 4); Long v. Tampico, 16 F. 491 (D. N. Y.); and see, The Carlo Poma, supra; The Beaverton, [fol. 363] 273 F. 539 (D. N. Y.); cf. The Johnson Lighterage No. 24, 231 Fed. 365 (D. N. J.); The Davis, 10 Wall. 15. That must be so if the basis of the doctrine of immunity, that the instruments of a foreign sovereignty should not be interfered with by judicial process, is to be fully appreciated and recognized.

Moreover, we have here as evidence of possession and control first that, while at Buenos Airs, the master placed himself "at the disposal of the Spanish Consul" pursuant to direct instructions by the Spanish Government; second, that the Consuls at Buenos Aires and Rosario made endorsements on the ship's registry and roll of which the master was aware and which claimed the Navemar as property of the Spanish Government; third, that the master on December 7, 1936, advised the former owners of the vessel that on October 28, 1936 the Spanish Government had obtained possession of the Navemar and that since that

date he had been "generally under orders of the Spanish Government" as given him by the Consul at Buenos Aires; fourth, that on December 2, 1936, the master signed a receipt acknowledging that the Spanish Consul in New York had given him $300. as an advance to attend to the expenses of the vessel.

It thus appears that the master and his vessel were acting under "compulsion of the sovereign"—subject to instructions of the Spanish Government or of its Consular representatives. The Roseric, supra.

In this view of the case, the court below erred in assuming jurisdiction of the libel and in refusing to act on the suggestion of the Spanish Ambassador.

Order reversed with directions to enter an order dismissing the libel.

Filed June 7, 1937.

[fol. 363½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compania Espanola, etc., v. S/S. Navemar, etc. (Copy.) Opinion. Manton, Circuit Judge.

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[fol. 364] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

PETITION FOR A REHEARING—Filed June 11, 1937

The only question before this Court was whether the Court below erred in entering its order of February 3rd, 1937, refusing to vacate the final decree and reopen the default of the respondents, and to permit said Fernando de los Rios to appear as claimant of the Steamship "Navemar".

The appeal from the final decree had been dismissed by this Court by its order of March 4th, 1937. Hence the direction at the foot of the opinion related to a decree which was not before the Court.

This Court, on June 7, 1937, filed an opinion in this cause which concludes with the words "Decree Reversed". As the only decree entered by the District Court was the final decree (R., pp. 140, 141) entered on the 14th day of December, 1936, it appears that the opinion directs that the final decree be reversed. It is respectfully submitted that the appeal did not involve the decree which the opinion directs [fol. 365] to be reversed, but was limited to an appeal from an order of the District Court, dated February 3, 1937. In order that the situation may be clearly understood, we shall review the proceedings taken below and in this Court before argument on appeal. After the entry of the decree of December 14, 1936, an order to show cause (R., pp. 145-148) was signed by Judge Galston on the 16th of December, 1936, on a suggestion signed by Jesse L. Rosenberg, as Proctor for Fernando de los Rios, Ambassador as aforesaid, appearing specially, and Luis Careaga, Acting Consul General of the Republic of Spain. In answering the suggestion, libellant denied each and every allegation of the said suggestion (fol. 447). In addition, libellant filed a number of exceptions to the suggestion. Among these exceptions were the following:

"31. The said Suggestion and Special Appearance are improper and insufficient in that they constitute an at-

tempt by an Ambassador, who is a diplomatic representative, to appear and act through an Acting Consul General, who is a commercial representative.

32. The said Suggestion and Special Appearance are improper and insufficient in that they constitute an attempt by an Ambassador, who is a diplomatic representative of a foreign sovereign, to appear and act through a private citizen of the United States, Jesse L. Rosenberg, who is an attorney at law and a member of the Bar and an officer of the above-entitled Court and certainly subject to its general jurisdiction" (fols. 476, 477).

The Court entered its order denying the application on the 4th day of January, 1937, but with leave to the Ambassador to renew his application at some later date (pp. 175-177).

On the 8th day of January, 1937, the District Court entered an order to show cause, directing the libellant to appear and show cause why the "default of the respondents should not be reopened; and why Fernando de los Rios, Ambassador of the Republic of Spain, without waiving any favors, privileges, immunities or exemptions to which said [fol. 366] Ambassador of the Republic of Spain may be entitled, should not be permitted *to appear as claimant,* and why such other and further relief as to this Court may seem just should not be granted" (fols. 535, 536). (Italics ours.) In support of this application, an affidavit was filed by Luis Careaga, who described himself as Secretary of the Embassy and Consul in Charge of the Consulate General of Spain in New York. This affidavit is without support of any certificate from the Department of State of the United States of America. The affidavit deals largely with a treaty between the United States and Spain, and sets up the circumstances upon which the Ambassador relies in asserting his claim that the "Navemar" was owned by the Republic of Spain. The affidavit ends with this prayer:

"Wherefore, deponent respectfully requests that the default of respondents be reopened, and that the said decree entered herein on the 14th day of December, 1936, be set aside and vacated, and that Fernando de los Rios, Ambassador of the Republic of Spain, duly accredited to the United States of America, in behalf of the Republic of Spain and without waiving any favors, privileges, immunities and exemptions to which the said Ambassador or the Republic

of Spain may be entitled, be permitted *to appear herein as claimant of the said steamship 'Navemar'* and for such other and further relief as to this Court may seem just in the premises" (fols. 573, 574). (Italics ours.)

In response to this order to show cause, the libellant filed objections and exceptions. Among the exceptions was the following:

"1. The application presented by the Spanish Ambassador for leave to appear does not conform to the views set forth in the written opinion* filed by the above entitled [fol. 367] court on the 31st day of December, 1936, and in the order entered thereon by the above entitled court on the 4th day of January, 1937" (fols. 589, 590).

"29. The said application for leave to appear or order to show cause is improper and insufficient in that they constitute an attempt by an Ambassador, who is a diplomatic representative, to appear and act through an Acting Consul General, who is a commercial representative.

"31. There has been no sufficient showing that Luis Careaga has been properly authorized by the Republic of Spain to present said application for leave to appear or said order to show cause.

"32. The said application for leave to appear or order to show cause, is improper and insufficient in that it constitutes an attempt by an Ambassador, who is a diplomatic representative of a foreign sovereign, to appear and act through a private citizen of the United States, Jesse L. Rosenberg, who is an attorney at law and a member of the Bar and an officer of the above-entitled Court and certainly subject to its general jurisdiction.

"33. The said application for leave to appear or order to show cause is improper and insufficient in that it constitutes

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* A reference to Judge Galston's opinion shows that the Court directed counsel's attention to In re Muir, 254 U. S. 522; The Pesaro, 255 U. S. 216 and Berizzi v. Steamship Pesaro, 271 U. S. 562. At pages 170-171 of the record the Court quotes from the opinion of the Supreme Court in The Pesaro, 255 U. S. 216, and points out that the petitioner's objection should have come through an official channel of the United States.

an attempt by the diplomatic representative of a foreign sovereign to exercise a sovereign prerogative within the territorial limits of the United States by claiming immunity and freedom from the above-entitled Court's jurisdiction and process of a privately-owned merchant vessel which is within the United States and whose private owner is domiciled in the United States and which has never been in the possession of the foreign sovereign'' (fols. 605-608).

On these exceptions the Court entered an order, dated the 3rd of February, 1937, as follows:

''It is hereby ordered that the said order to show cause issued on the 8th day of January, 1937, be and the same hereby is vacated and set aside, and that said second application of said Fernando de los Rios, Ambassador of the Republic of Spain, to vacate the final decree and reopen [fol. 368] the default of the respondents, and to permit said Fernando de los Rios to appear in the above entitled cause as claimant of the said Steamship 'Navemar', be and the same hereby is denied and this time without leave to renew, since it must be assumed all the facts have been fully presented; and

It is hereby further ordered that said exceptions and objections filed herein by the libellant to said order to show cause and to said second application of said Fernando de los Rios be and the same hereby are sustained'' (p. 276).

A notice of appeal was then served upon Bigham, Englar, Jones & Houston, Proctors for Libellant, 99 John Street, New York City, Thomas A. McDonald, Proctor for Manuel Freire, et al., 15 William Street, New York City and Crowell & Rouse, Proctors for Robins Drydock & Repair Co., 111 Broadway, New York City (p. 278). This notice reads as follows:

''Please take notice that petitioner, Fernando de los Rios, Ambassador of Spain to the United States of America, in behalf of the Republic of Spain, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the default decree entered herein on the 14th day of December, 1936, and from the decisions and orders entered herein on the 4th day of January, 1937, and on the 3rd day of February, 1937, sustaining the exceptions of the libellant and denying the motion to open the default, and

from each and every part of said decree, decisions and orders as well as from the whole thereof" (pp. 277, 278).

Thereafter a petition for leave to appeal was filed in this court, in the following language:

"Fernando de los Rios, petitioner herein, appearing specially, as Ambassador of the Republic of Spain, in behalf of the Republic of Spain, being aggrieved by the final decree entered in the United States District Court for the Eastern District of New York, bearing Docket No. A. 15,102, on the 14th day of December, 1936, and by the decisions and order [fol. 369] of this Court entered on January 4, 1937, and on the 3rd day of February, 1937, sustaining libellant's exceptions and denying petitioner's motion to open the default, hereby prays that an appeal be allowed from said decisions final decree and orders to the United States Circuit Court of Appeals for the Second Circuit" (pp. 279, 280).

An order was entered signed by the Honorable Martin T. Manton, allowing the appeal pursuant to the prayer of the petitioner (p. 280). Thereafter the libellant-appellee, Compania Espanola de Navegacion Maritima, S. A., moved this court to dismiss the appeal from the final decree of the 14th of December, 1936, to dismiss the appeal from the order of the United States District Court for the Eastern District of New York entered on the 4th day of January, 1937, and to dismiss the appeal from the order of the United States District Court for the Eastern District of New York entered on the 3rd day of February, 1937. After hearing argument on this motion, this Court on March 4, 1937 entered an order, the pertinent parts of which read as follows:

"Ordered that the appeal from the final decree of the United States District Court for the Eastern District of New York, entered on the 14th day of December, 1936, be and the same hereby is dismissed, and it is further

Ordered that the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 4th day of January, 1937, conditionally denying intervention, be and the same hereby is dismissed, and it is further

Ordered that the motion to dismiss the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 3rd day of February,

1937, unconditionally denying intervention, be and the same hereby is denied."

It appears from this order of this Court that the only appeal before this Court was the appeal from the order of [fol. 370] February 3, 1937, which is set forth in the last of the three paragraphs just quoted. The only "decree" mentioned in this order of this Court is the final decree entered in the United States District Court for the Eastern District of New York on the 14th day of December, 1936. The other actions of the United States District Court for the Eastern District of New York appealed from are all referred to by this Court as "orders". The same nomenclature is followed in the notice of appeal and in the petition for leave to appeal (see quotations above). It is respectfully submitted that the direction at the end of the opinion filed in this cause on June 7, 1937, is improper, as it deals with a subject which was not before the Court. The sole subject before the Court was: "Why Fernando de los Rios, Ambassador of the Republic of Spain, without waiving any favors, privileges, immunities and exemptions to which the said Ambassador of the Republic of Spain may be entitled, should not be permitted to appear as claimant, and why such other and further relief as to this Court may seem just should not be granted" (R., p. 179). We respectfully submit that if any mandate is to be issued to the United States District Court for the Eastern District of New York, such mandate should be confined to a direction that Fernando de los Rios, Ambassador of the Republic of Spain, be permitted to appear as claimant in the proceedings below.

It is respectfully submitted that the question of the Court's jurisdiction over the "Navemar" was not before this Court on the appeal from the order of February 3rd, 1937.

We call attention to the stipulation appearing on page 287 of the record, to the effect that the transcript submitted to this Court constituted only part of the record of the District Court. We respectfully submit that the final decree should not be reversed unless all of the records of the District Court relating to the "Navemar" are considered. These records were not presented to the Court because the appeal as allowed did not relate to the final decree.

The records of the United States District Court show [fol. 371] that the "Navemar" was on the 4th day of De-

cember, 1936, arrested by the marshal of that court (see copy of the Marshal's Return annexed hereto), and since that time that the "Navemar" has remained in the custody of the Court below, under Robins Drydock & Repair Company's libel, referred to at folio 834 of the record. These proceedings were brought on December 7, 1936 (R., fol. 2) or three days after the vessel was first taken into the custody of the Court. In these circumstances, under the decision of the Supreme Court of the United States in Ex Parte Whitney Steamboat Corporation, 249 U. S. 115, no arrest of the "Navemar" was necessary in order to give the court jurisdiction in the present case, and we submit the Court below did not err in taking jurisdiction of the libel as is stated in the opinion filed herein. In the Whitney case it was contended that as the vessel had been taken over by the United States Government before the Crane Company libel was filed, the vessel was exempt from seizure under that libel. The Supreme Court held, however, that because the vessel was under arrest at the time the Crane Company libel was filed, in pursuance to the prayer of a libel of the Patent Vulcanite Roofing Company, filed before the Government took over the vessel, and because the Government had permitted the vessel to remain in the custody of the marshal after being taken over, "there was nothing to prevent the vessel from being subjected to attachment under process in the Crane Company suit" (249 U. S., at p. 118). The situation is identical here. As the steamship "Navemar" was in the custody of the marshal pursuant to arrest under the libel of the Robins Drydock & Repair Co. at the time the libel in suit was filed, and as the Spanish Government had offered no objection to the jurisdiction of the court in that suit, there was nothing to prevent the "Navemar" from being subjected to the process of the court in the present suit. We submit, therefore, that the question of jurisdiction was not before this Court on this appeal.

[fol. 372] The fact that the crew had filed a libel for their wages and had obtained pay up to the 16th of December, 1936 from the libellant, should also be considered, as that fact is not only clearly relevant in connection with the emphasis laid in the opinion upon the $300 advanced by the Consul (see fol. 834, where reference is made to this libel filed by Mr. Thomas A. McDonald as Proctor for Manuel Freire, et al.), but also it sustains libellant's position that

the real controversy here was between an owner and his crew. Moreover, the record in the Manuel Freire case will show that that case was settled by the libellant, the owner of the "Navemar", paying all of the wages of the crew up to and including December 16, 1936.

If the whole case is considered, as would be the case upon an appeal from the final decree, it at once becomes apparent that the case does not fall within the doctrine of Jupiter No. 1, 1924, Probate 236, cited in the opinion filed herein by this Court on June 7th last, but it does fall within the doctrine of the Jupiter No. 3, 1927, Probate 122.

It is true that a Court will not investigate the truth of a declaration of a sovereign as to ownership, when a question of immunity from arrest is involved (1927, Probate 138); but "where no question of immunity from jurisdiction is involved, the declaration of the foreign sovereign as to the ownership of property" (1927, Probate 138) should not be accepted and that question should be investigated. In such a case the fact of ownership must be proved as any other fact. As we have shown, because the "Navemar" was under arrest under the Robins Dry Dock libel when the libel in suit was filed, and no objection to the jurisdiction had been offered to the jurisdiction in the Robins Dry Dock case, no question of immunity from arrest was presented in the present case. Indeed, in his affidavits and suggestions filed with the District Court to obtain orders to show cause, no objection to the jurisdiction was offered. The application was for leave to appear "as [fol. 373] claimant of the Steamship 'Navemar' " (fol. 574). It is true that these words are preceded by the words "without waiving any favors, privileges, immunities and exemptions to which the Ambassador of the Republic of Spain may be entitled" (fol. 574); but this is far from saying that there was any objection offered to the jurisdiction of the court. The omission of such objection is significant. Nor, as we have just said, could there have been any such objection because the "Navemar" was under arrest under the Robins Drydock libel before this suit was brought, and no objection had or has been offered to the jurisdiction of the Court in that suit.

If the case is to be considered as an appeal from the final decree, the Court should take cognizance of the fact that the so-called suggestion was not made through any official channel of the United States. Unless the fact of owner-

ship, possession and control is represented to the Court through an official channel of the United States then it must be proved in the same manner as a private suitor is compelled to prove a fact.

The suggestion of Careaga was made directly to the court, and not through any official channel of the United States. If objection to the jurisdiction is claimed this was most irregular. For, as it is pointed out in the exceptions quoted above, if the application is to be considered as contesting the court's jurisdiction, then the application should have been made through the official channels of the United States. The Pesaro, 255 U. S. 216, at page 218; Ex Parte Muir, 254 U. S. 522. See also The Sao Vicente, 260 U. S. 151.

There is nothing in the subsequent case of Berizzi v. Steamship Pesaro, 271 U. S. 562, which in any way affects these conclusions. In Berizzi v. Steamship Pesaro, the fact of the ownership of the "Pesaro" by the Italian Government was established by stipulation signed by the parties. There was no question presented in that case which related [fol. 374] to ownership of the ship—see 271 U. S. at page 570. The only question presented there related to the immunity of the ship after it had been established that she was owned, possessed and controlled by a foreign government. As indicated above, Hill, J., makes it clear in the Jupiter No. 3, supra, that the question of immunity is distinct from the question of ownership. Moreover, the Supreme Court of the United States in The Pesaro, 255 U. S. 216, has settled the question that if a foreign sovereign wishes to avoid proving ownership it must make its suggestion "through an official channel of the United States". There the Court said (255 U. S. 218):

"We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. *The suggestion was made directly to the court and not through any official channel of the United States.* True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion

show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. Ex parte Muir, 254 U. S. 522, And see United States v. Lee, 106 U. S. 196, 209. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must." (Italics ours.)

[fol. 375] We submit that this language clearly states that if the question of immunity is to be raised, it can only be raised upon the fact of ownership being presented to the Court in one of the ways approved by the Supreme Court in the Pesaro case, i. e., (1) by a suggestion filed through an official channel of the United States; or (2) by proof of ownership. If there is to be proof of ownership, the foreign sovereign must submit himself to the jurisdiction of the court and offer proof in the same manner as any other suitor.

We further submit that the exceptions taken to the form of the application in the District Court were good. We mention the matter now because we do not wish our failure to mention them to be considered as a waiver of such exceptions.

The decision in the opinion of this Court handed down on June 7, 1937, is in conflict with decisions in England and Belgium. It is desirable that upon this important question of International Law the decisions of our Courts should be in harmony with that of other maritime powers.

Since the case was argued and submitted, we have been informed by Messrs. William A. Crump & Son, solicitors of London, that the Belgian courts have decided that an order of confiscation of a vessel is without effect as to vessels outside the territorial jurisdiction of the confiscating power.

We have written for a copy of this opinion. As that opinion, and the opinion in the Jupiter No. 3, 1927 P. 122, 250, are in conflict with the opinions filed herein on June 7, 1937, and as it is desirable that the decisions of this country and those of other maritime powers should be in harmony on important questions of International Law, we respectfully submit that the decision in the Belgian case should be considered before this case is finally disposed of. Cf. Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U. S. 487. As was said in Jupiter No. 3, the question is one of foreign law, in the present case the law of Spain, [fol. 376] and if any such question is to be considered, testimony must be taken to show what that law may be. Obviously when there is no proof of foreign law, it must be assumed that the law is the same as our own, and that an order of confiscation is unconstitutional. But aside from the foregoing, if this question is to be gone into, obviously all that should be done now by this Court is to permit the Republic of Spain to file a claim to the "Navemar" after opening up the final decree. The parties then may call witnesses to prove the law of Spain.

It is respectfully submitted that a reargument should be had in this case for the following reasons:

(1) Because the direction contained in the opinion to reverse the decree below, relates to a matter which was not before the Court for consideration, viz.: the appeal from the final decree of the District Court. That appeal had been dismissed on March 4, 1937.

(2) Because the "Navemar" was under arrest and in the custody of the Marshal of the District Court of the United States for the Eastern District of New York at the time the libel in this case was filed, and no objection to the jurisdiction of the court had ever been offered in that case. For that reason no question relating to jurisdiction over the vessel was before the court.

(3) Because the suggestion was not made through an official channel of the United States, and unless a suggestion is made through an official channel of the United States, the fact of ownership, possession and control must be proved in the same manner as a private suitor is compelled to prove a fact.

(4) Because Luis Careaga, the Acting Consul of Spain, was not a proper representative to object to the jurisdic-

tion, nor has any proper proof been offered to show his official qualifications.

[fol. 377] (5) Because the Steamship "Navemar" has never been within the territorial jurisdiction of Spain since the date of the issuance of the alleged order of confiscation, and under the decisions of other maritime powers the order of confiscation remains ineffective under such conditions; and because this decision is in conflict with that of other maritime powers, and to sustain the present decision will be to establish a doctrine in conflict with that prevailing in England and that prevailing in Belgium, and because the law of Spain as to the validity and effect of the confiscation decree is a fact to be proved in the case.

Wherefore, we pray that a reargument be allowed in this case on the questions enumerated above.

Respectfully submitted, Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellee. D. Roger Englar, T. Catesby Jones, of Counsel.

Certificate of Counsel

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.

I further certify that this application is not made for the purpose of delay.

D. Roger Englar.

New York, N. Y., June 11th, 1937.

[fol. 378] Appendix

Marshal's return on process issued in the case of the Robins Dry Dock & Repair Company against the S. S. "Navemar".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Docket No. 15101

ROBINS DRY DOCK & REPAIR COMPANY, Libellant

against

S. S. "NAVEMAR", Her Engines, etc., Respondent

U. S. Marshal's Return

In obedience to the within Monition I attached the Steamship "Navemar", engines, etc. therein described on the 4th day of December, 1936, and have given due notice to all persons claiming the same that this Court will, on the 16th day of Dec. inst., at 10:30 A. M. (if the day shall be a day of jurisdiction; if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

A. C. Benninger, United States Marshal, E. D. N. Y.,
by Thomas A. Hanley, Deputy U. S. Marshal.

Dated 12-5, 1936.

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[fol. 379] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of June, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Augustus N. Hand, Circuit Judges.

COMPANIA ESPANOLA DE NAVEGACION MARITIME, S. A., Libellant-Appellee,

vs.

Spanish S/S. "NAVEMAR" et al., Respondents, FERNANDO DE LOS RIOS, Spanish Ambassador to the United States of America, Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

[fol. 380] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compania Espanola de Navegacion Maritime, S. A., vs. S/S. "Navemar" et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 14, 1937. William Parkin, Clerk.

[fol. 381] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar", Libellant-Appellee,

against

Spanish Steamship "NAVEMAR", Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanches, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant

Before Manton, Hand and Hand, Circuit Judges

Bigham, Englar, Jones & Houston, Esqs., Proctors for Appellee; D. Roger Englar, T. Catesby Jones, of Counsel.

Per CURIAM:

It is conceded that the S/S. Navemar was under arrest by a process in a libel filed by the Robins Dry Dock & Repair Co. against S/S. Navemar, issued December 7, 1936, and returned December 9, 1936, and was pending in the District Court for the Eastern District of New York. The record on appeal may be amended so as to read that the Navemar was attached and taken into the custody of the court under such process at the time the possessary libel herein was filed.

Pursuant to the stipulation of counsel, the record will be amended so as to include the exhibit offered at fol. 416, consisting of a power of attorney, dated February 14, 1936, under the signature of Enrique Carlos De La Casa, Minister Counselor under the seal of the Spanish Ambassador; telegram of authority of the Spanish Ambassador under date of September 14, 1936 to the attorneys for libellant, [fol. 382] and a letter of the Secretary of State of the United States dated March 17, 1936, addressed to His Excellency, the Spanish Ambassador.

The application for reargument is denied.

M. T. M., L. H., A. N. H., Circuit Judges.

Filed June 24, 1937.

[fol. 383] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of June, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Augustus N. Hand, Circuit Judges.

COMPANIA ESPANOLA DE NAVEGACION MARITIME, S. A., Libellant-Appellee,

vs.

Spanish Steamship NAVEMAR et al., Respondents; FERNANDO DE LOS RIOS, Spanish Ambassador to the United States, Petitioner-Appellant

A petition for a rehearing having been filed herein by counsel for the appellee;

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Further ordered that the record be amended in accordance with the opinion of this court filed June 24, 1937.

D. E. Roberts, Deputy Clerk.

[fol. 384] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Compania Espanola de Navegacion Maritime vs. Spanish Steamship Navemar. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 25, 1937. William Parkin, Clerk.

[fol. 385] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship Navemar, Libellant-Appellee,

against

Spanish Steamship NAVEMAR, Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant

It is hereby stipulated and agreed between the parties to this proceeding, that the documents annexed hereto are true photostatic copies of the documents referred to in the opinion of the above entitled Court, denying the application of Compania Espanola de Navegacion Maritima, S. A. for reargument, and ordered by the said Court to be included in the record on appeal herein.

Dated, New York., N. Y., June 30, 1937.

Jesse L. Rosenberg, Lynch, Hagen & Atkins, Proctors for Petitioner-Appellant, Fernando de los Rios, Ambassador of Spain to United States. Bigham, Englar, Jones & Houston, Proctors for Compania Espanola de Navegacion Maritima, S. A., Libellant-Appellee.

[fol. 385½] [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship Navemar, Libellant-Appellee, against Spanish Steamship Navemar, her engines, etc., and Rafael Crespo, et als., Respondents; Fernando de los Rios, etc., Petitioner-Appellant. Stipulation. Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellee, 99 John Street, New York City.

R XN147 27 DL= WP WASHINGTON DC 216P DEC 14 1936

SPANISH CONSULATE. FOR JESSE L ROSENBERG ATTORNEYS=
515 MADISON AVE=

I HEREBY AUTHORIZE YOU TO REPRESENT ME BEFORE THE UNITEDSTATES DISTRICT COURT NEWYORKCITY IN THE CASE OF SS NAVEMAR WHICH IS THE PROPERTY OF THE SPANISH GOVERNMENT=
FERNANDO DE LOS RIOS SPANISH AMBASSADOR.

239P

Telephone Your Telegrams to Postal Telegraph

No. 1446

United States of America

DEPARTMENT OF STATE

to whom these presents shall come, Greeting:

Certify That the document hereunto annexed is a true copy from the files of this Department.

In testimony whereof, I, CORDELL HULL,

Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk and Administrative Assistant of the said Department, at the City of Washington, in the District of Columbia, this seventeenth *day of* March, *1937.*

Cordell Hull
Secretary of State.

By [illegible]
Chief Clerk and Administrative Assistant.

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December 11 1936

352.1153-GARCIA, MARCELINO/5

Excellency:

Reference is made to your note of December 10, 1936, regarding a case pending in the United States District Court for the Eastern District of New York concerning the right to possession and ownership of the foreign steamship NAVENAR, in which you request that representations be made by the Attorney General of this Government in behalf of your Government.

In reply you are informed that it is the practice of this Department in cases such as the one presented in your note to refrain from taking any action which might constitute an interference by the executive authorities

WB

His Excellency

Dr. Don Fernando de los Ríos,

Ambassador of Spain.

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authorities of this Government with regard to the merits of the controversy. As your Embassy was orally advised this morning, your Government has the right to appear directly before the court in a case of this character.

Accept, Excellency, the renewed assurances of my highest consideration.

352.1153 Garcia, Marcelino/3

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[fol. 390] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship Navemar, Libellant-Appellee,

against

Spanish Steamship NAVEMAR, Her Engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant

It is agreed between the parties to this proceeding that the document hereto annexed is a copy of the document which was handed to Judge Galston by proctors for Petitioner and which is referred to at folio 416 of the printed record on appeal.

Dated, New York, June 17, 1937.

Bigham, Englar, Jones & Houston, Proctors for Libellant-Appellee. Lynch, Hagen & Atkins, Proctors for Fernando de los Rios, Spanish Ambassador to the United States of America.

[fol. 391] POWER OF ATTORNEY

Translation

SPANISH EMBASSY,
Washington:

Power of Attorney Number One Hundred

In the City of Washington, District of Columbia, Capital of the United States of North America, on the 23rd day of Decmber 1936, before me, Enrique Carlos de la Casa, Minister Counsellor of the Spanish Embassy at Washington, in notarial functions in conformity with the regulations prescribed by the Rules and Regulations of the Spanish Diplomatic Career, and in the presence of the witnesses which will be mentioned later.

Personally Appeared.—His Excellency Don Fernando de los Rios, Ambassador of the Spanish Republic in the

United States of North America, with residence in this capital, to me known and he having the legal capacity to execute this power of attorney he freely and expontaneously states:

That he, hereby delegates and grants power of attorney as ample and sufficient as it might be required by law, in favor of Mr. Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, State of New York, United States of North America, with residence in said City of New York, so that in his name, place and stead, and so that representing the deponent in his official character said attorney-in-fact may represent him in the defense of his actions and exceptions, especially in the litigation instituted before the Judicial Authorities of the City of New York, in the matter of the steamer "Navemar" attached by the Spanish Government, and to this effect celebrate acts of conciliation, leaving the mandator binded to the agreements made and to appear before the competent Courts and Tribunals of any rank and jurisdiction, authorities, centers and public functionaries, in civil, criminal, contentious-administrative or any other [fol. 392] kind, acts of voluntary jurisdiction possessory proceedings, of liberation, of dominion and others in which the deponent might be interested; to present briefs and to ratify them; to submit proofs; to ask for requisitions, citations and summons, to sell and to attach or to the lifting or cancellations of these; to challenge witnesses; to recuse functionaries; to solicit the practice of all the proceedings demanded by the respective procedure or that he may consider convenient in his rights; to be present at conferences or confrontation of witnesses, issuance of copies of documents and other proceedings to which he might be entitled; to designate members for the constitution of tribunal in the actions in which by virtue of law proceed; to present petitions; to take appeals and to desist of them when he may esteem it opportune to produce bonds and desposits in the cases according to the law, and to withdraw said bonds and deposits in its due course.

To substitute in whole or in part this power of attorney in favor of the person or persons whom he may believe convenient, revoking the substitutes and to appoint others attorneys-in-fact as many times as he may consider it opportune.

Thus he deposes and executes this power of attorney in the presence of the witnesses Mr. Antonio Garcia Lahiguera, and Mr. Juan Antonio Meana, both over 23 years of age, Spaniards, registered in this Embassy.

Having informed them of the right which the Law grants to them to read by themselves this document, at their request I proceed to read to them the whole contents of this document, and which the deponent ratifies and all of them sign with me on the date first above named.

[fol. 393] Of all of which, and also of knowing the deponent and the witnesses, I the Minister Counsellor of the Spanish Embassy at Washington, do hereby certify.—(Signed) Fernando de los Rios.—Antonio Garcia Lahiguera.—Juan Antonio Meana.—Enrique Carlos de la Casa, Minister Counsellor.

I, the undersigned, Minister Counsellor of the Spanish Embassy at Washington, do hereby certify, that this is the first copy of the original which under the number first above named in filed in the Protocol of Public Instruments of the Consulate of this Embassy of Spain, of the current year, and at the request of the interested party, I issue the present, which I sign and seal in Washington, District of Columbia, United States of North America, on the same day and year of its execution, having made notation of this issuance.

(Signed) Enrique Carlos de la Casa, Minister Counsellor. (Seal Spanish Embassy, Washington.)

Seen in this Consulate General of Spain good to legalize the signature and seal of Hon. Enrique Carlos de la Casa, Minister Counsellor of the Spanish Embassy at Washington.

New York, December 24th, 1936.

(Signed) Luis Careaga, Acting Consul General of Spain. (Seal Consulate General of Spain.)

Notary Public and County Clerks Authentication Follows:

I, Fernando Borrell, Chancellor of the Consulate General of Spain in New York, do hereby certify: That the foregoing is a true and correct translation of the original power of attorney written in the Spanish language next attached.

New York, January 14th, 1937.

Fernando Borrell, Chancellor. (Seal Consulado General de Espana.)

(Here follow three photos, side folios 394, 395 and 396.)

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EMBAJADA DE ESPAÑA
WASHINGTON

NUMERO CIEN----------

-----En la ciudad de Washington, Distrito de Columbia, Capital de los Estados Unidos de Norteamérica, a veintitrés de diciembre del año mil novecientos treinta y seis, ante mí, don Enrique Carlos de la Casa, Ministro Consejero de la Embajada de España en Washington, en funciones notariales de conformidad con lo prescrito por el Reglamento de la Carrera Diplomática, a presencia de los testigos que se expresarán----------

-----COMPARECE:- El Excelentísimo Señor don Fernando de los Ríos, Embajador de la República Española en los Estados Unidos de Norteamérica, con residencia en esta capital, a quien conozco y hallándose dicho Señor con capacidad legal para otorgar esta escritura, libre y espontáneamente dice:----------

-----Que delega y confiere poder tan amplio y bastante como en derecho se requiera a favor del señor don Luis Careaga, Secretario de Embajada y Cónsul Encargado del Consulado General de España en Nueva York, Estado de Nueva York, Estados Unidos de Norteamérica, con residencia en dicha ciudad de Nueva York, para que representando su persona y carácter oficial le represente en la defensa de sus acciones y excepciones, especialmente en el litigio entablado ante las autoridades judiciales de la ciudad de Nueva York, sobre el vapor "NAVEMAR", incautado por el Gobierno Español, y al efecto celebre actos de conciliación, dejando obligado al mandante a lo en ellos convenidos, y comparezca ante los Juzgados y Tribunales competentes de cualquier grado y jurisdicción, autoridades, centros y funcionarios públicos, en juicios civiles, criminales, contencioso-administrativos o de otra clase, actos de jurisdicción voluntaria expedientes posesorios, de liberación, de dominio y demás en que tenga interés el poderdante; presente escritos y los ratifique;

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EMBAJADA DE ESPAÑA
WASHINGTON

suministre pruebas; pida requerimientos, citaciones y emplazamientos, ventas y embargos o el alzamiento y cancelación de éstos; tache testigos; recuse funcionarios; solicite la práctica de cuantas diligencias exija el respectivo procedimiento o considere conveniente a su derecho; asista a juntas y careos, libranzas de copias y demás actuaciones a que tuviere derecho; designe vocales para la constitución de tribunal en los juicios en que a virtud de la Ley proceda; interponga y siga los recursos de ley y desista de los interpuestos y de los procedimientos cuando lo estime oportuno, constituyendo fianzas y depósitos en los casos procedentes y retirandolos a su tiempo.----------

-----Sustituir este poder en todo o en parte en favor de quien tenga por conveniente revocar las sustituciones y otorgar otras cuantas veces lo crea oportuno.----------

-----Así lo dice y otorga siendo testigos sin excepción para el acto, don Antonio García Lahiguera y don Juan Antonio Meana, ambos mayores de edad, españoles, registrados en esta Embajada.---

-----Enterados del derecho que la Ley les concede para leer por sí este documento, procedí por su acuerdo a la lectura íntegra del mismo de cuyo contenido se ratifica y firman conmigo en la fecha up supra.----------

-----De todo lo cual, así como de conocer al compareciente y testigos, Yo, el Ministro Consejero de la Embajada de España en Washington, doy fe.-(firmado) Fernando de los Ríos.-Antonio García Lahiguera.- Juan A. Meana.-Enrique Carlos de la Casa, Ministro Consejero.----------

395 Yo, el infrascrito, Ministro Consejero de la Embajada de España en Washington, doy fe, de que esta escritura es primera copia de la matriz

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EMBAJADA DE ESPAÑA
WASHINGTON

que bajo el número antes consignado, obra en el Protocolo de Instrumentos Públicos del Consulado de esta Embajada de España, del año corriente y a requerimiento del interesado, la expido, sello y firmo en Washington, Distrito de Columbia, Estados Unidos de Norteamérica, el mismo día y año de su otorgamiento, dejando anotada esta expedición.----------

El Ministro Consejero

Visado en este Consulado General de España
BUENO para legalizar la firma y sello de
Don Enrique Cabrera de la Cosa, Ministro
Consejero de la Embajada de España
en Washington.
Nueva York 24 de diciembre de 1936.

El Consul General

LUIS CAREAGA
CONSUL ENCARGADO

Nº 2417
GRATIS
Disposición 5.ª del Arancel.

STATE OF NEW YORK)
COUNTY OF NEW YORK

On the 24th day of December 1936, personally

STATE OF NEW YORK.)
COUNTY OF NEW YORK

On the 24th day of December 1936, personally appeared before me the Hon. Luis Careaga, Acting Consul General of Spain in New York, who acknowledged to me that he signed the foregoing instrument.

M. F. MOORE ETC
NOTARY PUBLIC, KINGS COUNTY
KINGS CO. CLK'S No. 115, REG. No. 8132
N. Y. CO. CLK'S No. 288, REG. No. 8K157
BRONX CO. CLK'S No. 32, REG. No. 154K38
COMMISSION EXPIRES MARCH 30, 1938

Form-3

No. 62898 SERIES D

State of New York, County of New York, } ss.:

I, ALBERT MARINELLI, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

DO HEREBY CERTIFY, that said Court is a Court of Record, having by law a seal; that whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a NOTARY PUBLIC acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certificate of his appointment and qualification as Notary Public for the County of ..... with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment of proof of deeds and other written instruments for lands, tenements and hereditaments to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this ..... day of 193

Clerk.

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[fol. 397] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 396, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Compania Espanola De Navegacion Maritima, S. A., Libellant-Appellee, against Spanish S/S. "Navemar" et al., Respondents; Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of July, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,723. U. S. Circuit Court of Appeals, Second Circuit. Term No. 242. Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", petitioner, vs. Spanish Steamship "Navemar", her engines, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1937. Term No. 242, O. T., 1937.

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Office - Supreme Court, U.
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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM 1937.

No. 242

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause, after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Compania Espanola de Navegacion Maritima, S. A., owner of the SS. "Navemar" for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of Matter Involved.

This is a proceeding in admiralty, begun by the filing of a libel for possession of the steamship "Navemar" in the United States District Court for the Eastern District of New York. The libel was *in rem* against the steamer and *in personam* against five individual members of the crew employed and paid by the petitioner, who had risen against the owner and master of the vessel, disputed their authority and denied them access to the vessel.

Although no claim to the vessel was filed and no appearance was entered by any of the individual respondents, the District Court proceeded to hear the case in open court and took the testimony of the master and officers of the vessel and the President of this petitioner, the owner of the vessel. After a full hearing, extending over a period of three days, the District Court entered a final decree on December 14, 1936, ordering the Marshal to deliver possession of the vessel to this libellant. This decree was executed on the same day, as appears from the return of the Marshal (R., p. 142). Two days later an application was filed by one Luis Careaga, describing himself as an Acting Spanish Consul General of the Republic of Spain, and purporting to act on behalf of the Spanish Ambassador, to have the vessel delivered to him. This application was rejected by the District Court and the appeal from its order on this point was dismissed by the Circuit Court of Appeals on motion (see order of March 4, 1937, R., pp. 313-314).

The Spanish Ambassador had endeavored to enlist the aid of the Department of State, but that Department, on December 11, 1936, finally declined to inter-

vene and referred the Ambassador to the courts (R., pp. 361, 362; *cf.* R., pp. 15, 19, 23).

On January 8, 1937, an order to show cause was obtained by "Jesse L. Rosenberg, Proctor for Fernando de los Rios, Ambassador of the Republic of Spain" (R., p. 178) why the final decree should not be vacated, and why the Ambassador "should not be permitted to appear as claimant" of the vessel (R., p. 179). This application was denied by the District Court in its order of February 3, 1937 (R., p. 274) pursuant to a written opinion filed on January 28, 1937 (R., p. 257). An appeal from that order was allowed by a Judge of the Circuit Court of Appeals; and the appeal from that order was the only matter before the Circuit Court of Appeals when the cause came on for argument in that Court. Nevertheless, the Circuit Court of Appeals not merely vacated the final decree and granted the request of the Ambassador that he be permitted to enter an appearance "as claimant", but went further and dismissed the libel, saying:

> "The claim of this public control is borne out by the Ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive" (R., p. 335).

The foregoing passage from the opinion below shows very clearly one of the points on which the petitioner seeks a review by this Court. The Spanish Ambassador seems to have understood correctly his legal position, and he offered to appear as a litigant and submit proof in support of his claim. The Circuit Court of Appeals, however, treated the Ambassador's statements as conclusive and as rendering evidence

unnecessary, notwithstanding they were contradicted by a mass of evidence taken in the District Court. This petitioner applied for a reargument in the Circuit Court of Appeals, but that application was denied (R., pp. 339, 357).

The libellant is a corporation created under the laws of Spain, but, as found by the District Court, "was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States" (R., p. 271). The steamship "Navemar" was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material to this case, under the jurisdiction or control of the Madrid Government. For a number of years the "Navemar" had been owned and operated by the libellant. At no time during the period material to this litigation had the "Navemar" been in any Spanish port or within any Spanish territorial waters.

At all material times she was under charter to Linea Sud-Americana, Inc., a New York corporation, and was engaged in the transportation of commercial cargoes between New York and South American ports pursuant to that charter. At the time of the events which gave rise to the present litigation the charter still had six months to run.

While the "Navemar" was in Argentine waters on a voyage which she was making pursuant to the above charter, the Spanish Consuls at Rosario and at Buenos Aires, without the consent of the shipowner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish Government by

a decree issued in Madrid on October 10, 1935, by the President of Spain. This decree was issued *ex parte.*

There is no evidence in the record excepting the bare statement of Careaga (R., p. 188), as to the effect of the Spanish decree even under the laws of Spain; nor is there any evidence as to what, if any, effect the endorsement on the ship's papers had under the law of the Argentine Republic or under the law of Spain. The endorsement was not accompanied or followed by any attempted or purported change in the physical possession of the vessel. On the contrary, the master was told that no instructions whatever had been received from the Spanish Government by the Spanish Consuls as to any change in the possession or employment of the vessel, and they interposed no objection to his continuing with the performance of his charter.

When the vessel arrived in the port of New York she was laden with a general commercial cargo consigned to various American consignees. This cargo was delivered and the freight was collected by the master on behalf of the charterer and paid over by him to the charterer. At no time was any objection made by any one to this course of procedure.

In the course of its opinion holding that the decree of October 10, 1936 issued in Madrid was without effect to transfer ownership or right of possession from the shipowner domiciled in this country and holding actual possession of its vessel here, the District Court mentioned the decision of the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Belmont,* 85 F. (2d) 542, but pointed out that the doctrine of that case was not necessary to the decision of the present case. The Circuit Court of Appeals decided the present case after

United States v. *Belmont* had been reversed by this Court on May 3, 1937. Without commenting upon the District Court's construction distinguishing that case, the Circuit Court of Appeals held in effect that a decree of confiscation is effective as against a vessel flying the flag of the sovereign which has issued the decree of confiscation, no matter where she may be (whether or not within the territorial limits of another sovereign, and whether or not the owner of the vessel is permanently domiciled in the territory of such other sovereign and has the vessel in his actual possession there). Proceeding from this premise, the court reached the conclusion that the "Navemar" was the property of the Spanish Government by virtue of the confiscatory decree of October 10, 1936, notwithstanding the fact that the vessel had never been within the territorial limits or jurisdiction of Spain since the decree was issued. As we shall show in the attached brief, the decision of this Court in *United States* v. *Belmont,* upon which the Circuit Court of Appeals relies (R., p. 335), does not require or authorize such a holding.

Contrary to the conclusion of the District Court (R., p. 172), the Circuit Court of Appeals held that a ship only *constructively possessed* by a sovereign is immune from judicial determination (R., p. 336). To reach this conclusion, the Circuit Court of Appeals stated a new principle of law squarely in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, at page 21.

The Circuit Court of Appeals itself recognized that its present decision was in conflict with the weight of authority, in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, and in conflict with the decision of the Circuit Court of Appeals

for the Fourth Circuit in *The Attualita,* 238 Fed. 909. It said (R., p. 336):

> "Having dedicated the vessel to the public service by subjecting it to its control, the Spanish Government must be regarded as at least in constructive possession of her, which for the purposes of immunity, is as efficacious as actual possession through the Government's own officers. *The Roseric,* 254 Fed. 154; *The Adriatic* 258 Fed. 902; *The Jupiter* (*No. 1*) (1924) P. 236; Hyde Sec. 256; *Contra, The Attualita,* 258 Fed. 909 (C. C. A. 4); *Long* v. *The Tampico,* 16 F. 491 (D. N. Y.); and see *The Carlo Poma,* 259 Fed. 369; *The Beaverton,* 273 F. 539. *Cf. The Johnson Lighterage No. 24,* 231 Fed. 365; *The Davis,* 10 Wall. 15."

We shall show in the attached brief that *The Roseric* and *The Jupiter,* cited in this passage, do not support the proposition for which they are cited; and that "The Adriatic" also cited, is distinguishable, and if assumed to be in point has been overruled by this Court in *Ex parte Muir,* 254 U. S. 522.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(*1*) The decision of the Circuit Court of Appeals directing that the libel be dismissed merely on a suggestion, without proof, when the suggestion is not made by an official of the United States, is a decision on an important question of maritime and international law in a way which is in conflict with applicable decisions of this Court in *Ex parte Muir,* 254 U. S. 522, and in *The Pesaro,* 255 U. S. 216. Moreover, on principle, a private suitor cannot be

denied the protection of the courts on the bare statement of persons unknown to the courts, even though such persons may in fact be the spokesmen of a foreign sovereign. Such a denial can only be based on a suggestion from the sovereign by which the Courts are created or by legal proof adduced in the ordinary way. This principle illustrates the importance of the distinction between actual and constructive possession. Any interference with property in the actual possession of a sovereign is in effect an attack on the sovereign, and the proper remedy is an application through diplomatic channels to the sovereign in whose territory the attack is threatened. On the other hand, a sovereign who seeks to obtain possession, within the territorial limits of another power, of property which has never been in its actual possession, must prove its title and right to possession like any other suitor.

The present case has not proceeded along either of the lines above described. Our state Department has declined to intervene, no doubt recognizing the impropriety of permitting itself to be used as a means of seizing property which has never been in the possession of the Spanish Government. Having deliberately refrained from becoming a party to the present litigation, in the hope of accomplishing its purpose through diplomatic channels, the Spanish Government comes in nearly a month after the final decree has been entered and asks that the court set aside its decree in order to give the Spanish Government an opportunity to challenge its jurisdiction. The refusal of the District Court to grant this application might well be sustained on discretionary grounds, quite apart from the merits of the case. The Circuit Court of Appeals, however,

not content with granting this extraordinary request of the Spanish Government, not merely sets aside the decree but dismisses the libel, although no application for such relief was before it.

This petitioner applied for a reargument and called the attention of the court to the fact that it had dealt with a question which was not before it (R., p. 339); but this application was denied (R., p. 357).

The extraordinary character of the decree of the Circuit Court of Appeals is emphasized by the fact that this proceeding was begun by the petitioner to oust from the vessel a group of men who had risen against the master and excluded him from any control over her. The Circuit Court of Appeals regarded the master as the individual who held "constructive" possession for the Spanish Government; and yet this proceeding by this petitioner was begun to reinstate him in possession and control. And even then his possession and control was secondary to that of the marshal, who had the vessel under attachment in another proceeding (R., p. 356). Until the mutineers were ousted the respondents apparently were glad to stand by and await the outcome; they now accept the fruits of the proceeding and at the same time challenge the court's jurisdiction. Moreover, if, as the Circuit Court of Appeals holds, the master was holding "constructive" possession for the Republic of Spain, he was doing so unwittingly because he testified (R., pp. 24, 100, 103, 104; and see also, Chief Officer Gomez, R., pp. 65, 63, 61) that he was at all times holding possession for this petitioner, who was the owner and still employing him and the crew, and paying them wages (R., pp. 327, 328) for services in connection with an unexpired charter party to an American commercial corporation.

We respectfully submit that if this decision stands the whole law of sovereign immunity will have been rewritten.

(*2*) The decision of the Circuit Court of Appeals for the Second Circuit in the present case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909 (C. C. A. 4). This conflict was expressly admitted by the Circuit Court of Appeals for the Second Circuit in its opinion in the present case as follows (R., p. 336):

> "Having dedicated the vessel to the public service by subjecting it to its control, the Spanish Government must be regarded as at least in constructive possession of her which, for purposes of immunity, is as efficacious as actual possession asserted through the Government's own officers. *The Roseric, supra; The Adriatic, supra; The Jupiter* (1924), p. 236; Hyde, *supra,* Sec. 256; *Contra, The Attualita,* 238 Fed. 909 (C. C. A. 4); *Long* v. *Tampico,* 16 F. 491 (D. N. Y.)."

(*3*) The decision of the Circuit Court of Appeals in the present case that Mr. Careaga, the Acting Consul General of Spain at New York, was clothed with diplomatic authority by the alleged power of attorney (R., pp. 363-366) is in conflict with the applicable decisions of this Court in *The Anne,* 3 Wheat. (U. S.) 434; *The Sao Vicente,* 260 U. S. 151; *Terlinden* v. *Ames,* 184 U. S. 270, at page 288; and *Doe ex dem. Clark* v. *Braden,* 16 Howard (U. S.) 635, at page 656, where this Court held that it is for the Executive Department of the Government, rather than the Judicial Department, to determine who represents a foreign government. (See also, fol-

lowing those decisions of this Court, *State of Russia* v. *National City Bank of New York*, 69 Fed. 2nd 44, at p. 47).

(4) The decision of the Circuit Court of Appeals in the present case that immunity of property of a sovereign depends on ownership, constructive possession (R., p. 336), dedication (R., p. 336), or being "subject" to jurisdiction or control (R., pp. 335 and 336), is in conflict with the applicable decisions of this Court in *The Davis*, 10 Wall. (U. S.) 15, and in *Ex parte Muir*, 254 U. S. 522, at page 532, that "merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were not within the range of judicial notice and needed to be established in an appropriate way"; and with the long-settled maritime law of the United States as followed, for example, in *The Carlo Poma*, 259 Fed. 369, at page 370,

> "that immunity of property of a sovereign depends, not merely upon ownership but also upon actual possession".

(5) The decision of the Circuit Court of Appeals in the present case that a decree of confiscation by a sovereign is effective to transfer ownership and right of possession of a vessel which is within the territorial limits of another sovereign, and in the private owner's possession there, is a decision on an important question of general law and maritime law which is untenable and in conflict with the weight of authority and with the decisions of the admiralty courts in other maritime nations, and is specifically

in conflict with the decision of the Court of Appeal in England sitting in admiralty in *The Jupiter No. 3* (1927), Probate 250, and with the decision of the Belgian courts in *Maritarena* v. *Amaliogeta and Urutia* (Translation of opinion annexed to our brief).

(*6*) The decision of the Circuit Court of Appeals in the present case, to the effect that a vessel which has been dedicated to public service is immune from process, although the sovereign does not actually possess her, and although there is no evidence that she is being used for public purposes, is in conflict with applicable decisions of this Court in *Ex Parte Muir,* 254 U. S. 522, and in *The Davis,* 10 Wall. 15. It is also a decision on an important question of general law which is in conflict with the weight of authority, as shown by the contrary decisions in *The Jupiter,* L. R. 1924 Probate 236, at page 241, 369; *Long* v. *The Tampico,* 16 F. 491 (Addison Brown, *J.*); *The Beaverton,* 273 Fed. 539; and *The Johnson Lighterage No. 24,* 231 Fed. 365 (D. N. J.).

WHEREFORE, petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled *Compania Espanola de Novegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Libellant-Appellee* v. *Spanish Steamship "Navemar", her engines, etc., and Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanches, Respondents,* (*Fernando de los Rios, Spanish Ambassador to the United States of America, Petitioner-Appellant*), 1936, October

Term, No. 401, and that the decision of the said Circuit Court of Appeals entered on the 7th day of June, 1937 (R., p. 330) and ordered entered on the 14th day of June, 1937 (R., p. 355), be reversed, and for such further relief in the premises as may be just.

Dated, New York, N. Y., July 23, 1937.

COMPANIA ESPANOLA DE
NAVEGACION MARITIMA, S. A.

By: D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. .

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "Navemar",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, *et al.*,

and

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain,

Respondent in this Court.

BRIEF FOR PETITIONER.

Opinions Below.

The opinions below are officially reported as *The Navemar* (E. D. N. Y.), 18 Fed. Supp. 153 (see, also, 17 Fed. Supp. 495), 1937 American Maritime Cases 26 (see also p. 22), printed in the Record at pages 257 and 166; and *The Navemar* (C. C. A. 2), not yet officially reported, printed in the Record at page 330.

Jurisdiction of This Court.

The jurisdiction of this Court is under Section 240 of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1 of the Constitution of the United States.

The decree of the Circuit Court of Appeals that the libel be dismissed on the ground that the District Court was without jurisdiction is a final decree, *The Pesaro,* 255 U. S. 216, at page 217.

The Facts.

The facts are stated in the foregoing petition and will not be repeated here. We will merely supplement the petition by quoting the following findings in the opinion of the District Court (R., pp. 270, 271), which are established by the uncontradicted evidence:

> "Baldly, the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. In all reason the answer to such question must be in the negative.
>
> Moreover, the position of the present claim need not rest on such broad though controlling base. For the reasons set forth in the opinion denying the former application this application must also be denied. The steamship 'Navemar' was not an armed vessel, was not a vessel in the public service of the Republic of Spain, was not possessed by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all

members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer. * * * Proof, however, shows that this corporation was domiciled, so far as domicile is possible to a corporation, in the United States, with its affairs directed and controlled by its agents resident in the United States."

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the present case that the libel must be dismissed for want of jurisdiction because of allegations of fact contained in a suggestion made directly to the Court by a private lawyer or consul allegedly representing a foreign Government or Ambassador, and not through the Attorney General or Secretary of State or other official channel of the United States, is in conflict with applicable decisions of this Court in *The Pesaro*, 255 U. S. 216, 218-219, and in *Ex parte Muir*, 254 U. S. 522, 532, and if permitted to stand will confuse the procedure in all cases where property in this country is claimed by a foreign sovereign.

As stated in the petition, the only question which was before the Circuit Court of Appeals concerned the denial by the District Court of the application of Luis Careaga, Acting Consul General of the Republic of Spain, alleged to be specially clothed with diplomatic authority to make the application on behalf of the Spanish Ambassador, to intervene and file a claim in these proceedings on behalf of the Republic of

Spain. The court below, instead of granting the relief prayed for, directed that the libel be dismissed on the ground that the court below had no jurisdiction. It based its ruling on a so-called suggestion filed by Careaga and the facts contained therein. But even if the Careaga affidavit be treated as a suggestion, it was insufficient, because, as was said in *The Pesaro,* 255 U. S. 216, at pages 218 and 219, where the facts relied upon to support the claim for immunity are not considered and determined by the Executive Department, and placed before the Court through an official channel of the United States Government, such facts must be alleged and established by evidence by the foreign Government as a party to the cause. This Court in the *Pesaro* case said (255 U. S. at pp. 218 and 219):

> "Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status, it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United

States was well taken. *Ex parte Muir,* 254 U. S. 522."

The action of the Court in the present case in treating the allegations in the unofficial suggestion as proved, and in directing that the cause be dismissed for want of jurisdiction, is squarely in conflict with the decision of this Court in *The Pesaro, supra.* We submit that in any event the Circuit Court of Appeals had no power other than to direct the District Court to permit the Republic of Spain to intervene and to offer proof as to its ownership of the "Navemar". After the decision in *The Pesaro,* 255 U. S. 216, the Italian Government submitted itself to the jurisdiction of the Court—*Berizzi* v. *Steamship Pesaro,* 271 U. S. 562; and, recognizing that it must establish as a fact that it was the owner of the S. S. "Pesaro", the Italian Government sought and obtained a stipulation from the libellant in that case establishing that fact. Obviously, if the question of ownership or possession is in dispute, under these decisions, ownership or right to possession must be proved like any other fact, and the failure of the court below to require such proof introduces a new doctrine into our law which is in conflict with the long-settled practice which this Court has held must be followed.

In *Ex parte Muir,* 254 U. S. 522, at 532 this Court said:

> "As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire,* 11 Wall. 164, 167; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.,* 190 U. S. 524. Or, with its sanction,

its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne,* 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange,* 7 Cranch. 116; s. c. 16 Fed. Cas. No. 8,786; *The Pizarro,* 19 Fed. Cas. No. 11,199; *The Constitution,* L. R. 4 P. D. 39; *The Parlement Belge,* L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

"But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae,* and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee,* 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

II.

Actual possession and not constructive possession is necessary under the law of the United States to permit a foreign government to claim immunity in respect of property owned by it, and the decision of the Circuit Court of Appeals that constructive possession is sufficient is without precedent and is in conflict with the decisions of this Court.

In *Ex parte Muir,* 254 U. S. 522, at page 532, this Court said:

> "*Prima facie the District Court had jurisdiction of the suit and the vessel, The Belgenland,* 114 U. S. 355, 368-369, *and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough.* These were matters which were not within the range of judicial notice and needed to be established in an appropriate way. They were not specially within the knowledge of the libelant, nor did it have any superior means of showing the real facts. Thus from every point of view it was incumbent on those who called the jurisdiction in question to produce whatever proof was needed to sustain their challenge." (Italics ours.)

That employment in the service of the State must be shown is well settled, see *Ex Parte State of New York,* 256 U. S. 503, where this Court said (at p. 510):

> "By the law of nations, a vessel of war owned

by a friendly power *and employed in its service* will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFadden,* 7 Cranch. 116, 144-147." (Italics ours.)

And see also *Long* v. *The Tampico,* 16 Fed. 491 (Southern District of New York), where Judge Addison Brown said, at pages 493 and 494:

> "The elaborate and exhaustive examination given to the subject of the exemption of the property of a sovereign power in the cases of *The Exchange,* 7 Cranch. 117; *Briggs* v. *Lightboats,* 11 Allen (Mass.) 157; and *The Parlement Belge* (1880), on appeal (5 Prob. Div. 197), renders superfluous any further examination of the general principles involved. These cases fully sustain the general proposition that the property of a government, *while in its possession and employed in or devoted to the public use,* is exempt from judicial process, on the ground that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority and the necessities of the public service. In the late case of *The Fidelity,* 16 Blatchf. 569, * * * Waite, *C. J.,* says: * * *
>
> > *'Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use,* and must be employed in carrying on the operations of the government.' "
> > (Italics ours.)

All that can be said here is that there was an allegation by Careaga that *it was intended* that the vessel should be used in the public service (R. 187).

Certainly the allegations here were no stronger than they were in *Ex Parte Muir,* 254 U. S. 522, and if the allegations were not enough in *Ex Parte Muir,* we submit that they were not enough here. If they were not in the range of judicial notice in *Ex Parte Muir,* how can they be in the range of judicial notice here? In other words, to sustain the decision below, we must abandon the salutary rule laid down in *Ex Parte Muir* as to what a foreign Government must show in order to establish immunity, and the rule in *Ex Parte State of New York,* 256 U. S. 503, which requires that the vessel shall be employed in the service of the State before she is immune.

The Circuit Court of Appeals, as we pointed out in the petition, has held that if a foreign sovereign issues a decree confiscating a vessel, so that the vessel becomes the property of the sovereign, then although the vessel is on the high seas or in foreign territorial waters, actual possession is not necessary to clothe the vessel with immunity, and that constructive possession is sufficient possession for that purpose (R., pp. 335, 336). This holding of the Circuit Court of Appeals is in sharp conflict with its own previous holding in *The Carlo Poma,* 259 Fed. 369, where that Court said:

> "The law of the United States is the same except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon *the actual possession* by this sovereign of the property at the time process is served. *The Davis,* 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 49; *The Attualita,* 238 Fed. 909." (Italics ours.)

The Carlo Poma was reversed but on other grounds—see 255 U. S. 219.

The language of *The Carlo Poma* was cited and approved in *The Beaverton,* 273 Fed. 239.

The decision is also squarely in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909, and with the decision of this Court in *The Davis,* 10 Wall. 15. See, also, the decision of Judge Addison Brown in *Long* v. *The Tampico,* 16 Fed. 49; also *Johnson Lighterage No. 24,* 231 Fed. 365. It was decided in all of these cases that actual possession is necessary in order to clothe a vessel with immunity.

During the course of its opinion, the Circuit Court of Appeals stated that the master of the "Navemar" had recognized that he held possession of the vessel for the Spanish Government. It is respectfully submitted that this statement is in conflict with the testimony both of the master and of the chief officer of the vessel (R., pp. 24, 61, 63, 65, 100, 103, 104) and even if it were true, it would be wholly immaterial. Mr. Justice Hill discusses the relation of a master to his owners and to his ship, particularly as to whether a master has any legal right to vest possession of the vessel in any person. *The Jupiter No. 3* [1927] Probate 122. Mr. Justice Hill reached the conclusion that the master was merely a custodian, that he had no legal right to vest possession in any person, and that the custody of the master is for the legal owner. It cannot be disputed that *prima facie* the legal owner here was the libellant, petitioner. It held a bill of sale (*Hozey* v. *Buchanan,* 16 Peters 215, at pp. 219 and 220). Endorsement on the register or ship's roll does not affect ownership, as a ship's

register is insufficient to show ownership. *National Oil Transport Co.* v. *United States,* 18 Fed. (2d) 305).

The Circuit Court of Appeals assumed that the master had placed himself at the disposal of the Spanish Consulate at Buenos Aires and that that was important (R. 336), and it cites (R. 336) *The Jupiter* (1924), Probate Div. 236, in support of the proposition that constructive possession is sufficient. It overlooked the fact commented upon in *The Jupiter* case, that the Soviet Government at the time of the first seizure had "actual possession" (1924) Probate at page 241, and (1927) Probate at page 129. In the present case, however, Captain Martinez never permitted the Spanish Government to take actual possession of his ship. Consequently, the Spanish Government was never in possession, because, notwithstanding whatever Martinez may have said concerning his custody, the custody of Martinez was for the owner, the libellant below and the petitioner here. For, as was said by Hill, *J.* (1927), Probate at page 135:

> "It follows that the custody of Captain Lepine was for M. Bourgeois, as it had previously been for Maitre Pelen. Captain Lepine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable *in personam*?
>
> The result of these considerations is that in March, 1924, when Lepine allowed the U. S. S.

> R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U. S. S. R., but he betrayed his trust to his employers. *Prima facie* the act of Lepine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court."

So also with respect to the five members of the crew of the "Navemar" against whom this suit for possession *in personam* was brought. Whatever may have been their intention in depriving the owner of possession, their possession was for the petitioner here. The libellant below, the petitioner here, paid their wages—see the decree (R., pp. 327, 328). It is submitted that when the Circuit Court of Appeals decided that constructive possession is sufficient, its decision was in conflict with the weight of authority, and in conflict with the decision of this Court in the case of *The Davis,* 10 Wall. 15, where this Court (at p. 21) said:

> "But what shall constitute a possession which, in reference to this matter protects the goods from the process of the court? The possession which would do this must be *actual possession,* and not that mere *constructive possession* which is very often implied by reason of ownership under circumstances favorable to such implication." (Italics ours.)

III.

The decision below that a decree of confiscation is effective when the property confiscated is within the territorial limits of another sovereign and in the possession of its owner there, is contrary to international law as generally understood and applied by the other maritime nations.

In England, in *The Jupiter No. 3* (1927), Probate 122, it was squarely held that such an edict does not affect property outside of the territory of the confiscating power. At page 144 of the opinion of Mr. Justice Hill, it was said:

> "As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the Jupiter was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized in all the cases: see, for instance, per Atkin, *L. J.*, in *Gouksaaow's* case (1923) 2 K. B. 682, 693; per Sargant, *L. J.*, in *Sedgwick, Collins & Co.'s* case in the Court of Appeal (1926) 1 K. B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords (1927) A. C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation." (Italics ours.)

Mr. Justice Hill's opinion was adopted *in toto* by the Court of Appeal. See *The Jupiter* (1927), Probate 250, at page 253, and at page 255.

The opinion in *The Jupiter* is in accord with the law of Belgium. See *Martiarena* v. *Amalibobeta and Urutia,* reported in the Rechtskundig Weekblad (Weekly Law Gazette, published at Antwerp) in the issue of March 7, 1937. We annex a copy of a translation of that opinion as an appendix to this brief. The law of the Netherlands appears to be the same. See *German Reich* v. *Merzbach, et al.* (1925) (Netherlands) Weekly Law Journal, No. 11440 (published at The Hague). That case involved the title to some rafts which had been exported from Germany in violation of German law, which provided that no goods could be sent out of Germany without a proper export license, and further that, if they should be so sent out, the goods would be forfeited to the German Reich. The German Reich contended that as soon as the rafts left the German territory without the export license, they automatically became the property of the German Government. Notice of forfeiture was served upon the persons in possession of the rafts while the rafts were within the territorial jurisdiction of the Netherlands. In deciding the case, the Court said, without giving further reasons for its decision:

> "* * * as it is contended (by the German Reich) that title passed herein by virtue of the notice * * * its position involves a violation of the sovereignty of the State of the Netherlands, which does not permit that effect be given to the official notice served on behalf of the German Reich on Netherlands territory * * *."

In this connection also see

> *In re Russian Bank for Foreign Trade* (1933), 1 Chan. 745.

In Frankenstein on Conflict of Laws, Volume II, page 77, it is said:

> "The *lex rei sitae* on principle also governs the acquisition of title through an act of State." (Citing *The Jupiter* (1927) Probate 250.)

We submit that there is nothing in the recent case of *United States* v. *Belmont,* which requires a contrary conclusion. In that case the Russian Government took over and confiscated a Russian corporation, which had its situs in Russia. Consequently, when our Government recognized the act of the Russian Government in taking over the corporation as a legal act, then the property of the corporation involved, in that case a bank balance, became the property of the Russian Government. In the majority opinion in *United States* v. *Belmont,* the Court refers with approval to the judgment of Bankes, *J.*, in the case of *A. M. Luther* v. *James Sagor & Co.* (1921), 3 K. B. 532. The same judge, Bankes, *J. L.*, wrote the leading judgment in *The Jupiter No. 3,* (1927) Probate 250. He adopted the opinion of Hall, *J.*, below ((1927) Probate 122 at 140), where it is clearly stated that when property is beyond the jurisdiction of the confiscating power, the edict of confiscation is ineffective.

So far as we have been able to discover, the decision of the Circuit Court of Appeals, to the effect that a decree of confiscation is effective when the property confiscated is entirely outside of the territorial limits and jurisdiction of the confiscating power, and in the possession of its owner, is without precedent. We respectfully submit that this question, which has been decided by the Circuit Court of

Appeals in conflict with the laws of other leading maritime powers on the same subject, should be reconsidered by this Court. It is indeed a novel doctrine to say that when a vessel is in foreign territorial waters she is subject to confiscation by the Government of her flag. On a subject such as this our law should not be permitted to vary so greatly from that of other maritime powers. *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487.

IV.

(a) Luis Careaga, who made the suggestion, was alleged to be an Acting Consul General of Spain. As such he was without authority to make any representation whatever on behalf of the Republic of Spain.

(b) The question whether or not Careaga was clothed with a diplomatic function was a political question and not a judicial question, and in the absence of a decision on that question by the political department of the Government, the Court should have disregarded the application of Careaga.

(a) It has long been settled by decisions of this Court that a Consul as such is not clothed with authority to act as a diplomatic agent of his sovereign. See *The Anne,* 3 Wheat. 434, at 445, where this Court, speaking through Mr. Justice Story said:

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office con-

fers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *charge d'affaires,* in behalf of his sovereign, would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment."

Recently in the case of *The Sao Vicente,* 260 U. S. 151, this Court took occasion to quote much of the foregoing language and to approve it.

(b) In the present case, after making his first application, which was denied, Careaga filed a certificate stating that a Power of Attorney, clothing

him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. "Navemar", was lodged in the Embassy of Spain at Washington. This certificate is signed by the Counsellor to the Embassy and is certified by Careaga and the Counsellor to the Consulate. No certificate or statement of any kind has been made by any political officer of the Government of the United States as to Careaga's status. Under these circumstances we submit that the court should disregard Careaga, for the reasons set forth in *The Anne, supra.* Proof of delegation of special diplomatic authority should be made to the political department and until such proof is made Careaga cannot be considered as being clothed with diplomatic authority. See *Doe ex dem. Clark* v. *Braden,* 16 How. 645, where this Court held that it was for the Executive Department of the Government rather than for the Judicial Department, to determine who represents a foreign government. See also *Terlinden* v. *Ames,* 184 U. S. 270.

In *State of Russia* v. *National City Bank of New York,* 69 F. (2d) 44, the Circuit Court of Appeals for the Second Circuit said:

> "As to the authority of Foreign Commissar Litvinoff to make the assignment on behalf of his government, there is a presumption of authority in his designation, recognition, and the President's acceptance of the assignment. It is a matter of political action in foreign affairs, and *the question of who represents and acts for a sovereign or nation in its relation to the United States is determined, not by the Judicial Department, but exclusively by the political branch of the government. Lehigh V. R. Co.* v. *State*

of Russia, supra; Doe ex dem. Clark v. *Braden,* 16 How. 635, 656, 14 L. Ed. 1090; Hyde on International Law, Vol. -, p. 368; *Terlinden* v. *Ames,* 184 U. S. 270, 288, 22 S. St. 484, 491, 46 L. Ed. 534." (Italics ours.)

See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363, where the Circuit Court of Appeals for the Second Circuit said (pp. 368-369):

"In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. *In re Baiz,* 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificates of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates."

CONCLUSION.

Because the decision below is on important questions of maritime and international law and is in conflict with the great weight of authority, with the applicable decisions of this Court, with the decision of the Circuit Court of Appeals for the Fourth Circuit, and with the decisions of the courts in other maritime countries, we respectfully submit that a writ of certiorari should be granted in order that these questions may be definitely and finally decided in this country.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
OSCAR R. HOUSTON,
JAMES W. RYAN,
Proctors for Petitioner.

APPENDIX A.

Martiarena v. *Amaliobeta*

RECHTSKUNDIG WEEKBLAD (WEEKLY LAW GAZETTE)

7th March 1937, No. 25, 1065

CIVIL COURT OF ANTWERP

2nd Chamber (bis) 18th February 1937.

President: A. Stellfetd. Judges: Van Mieghem and Jageneau.

Pl. R. Van de Vorst against A. Lilar.

International private law. Claiming of ships by the Spanish government. Conditions of validity in accordance with Belgian international private law.

Two ships which left a Spanish port took refuge at Antwerp. They were claimed there by their owner and chained up. Against this claim it is pleaded that they are said to be regularly requisitioned by the Spanish authorities. Is this requisition valid for Belgian law?

The judgment decides that in order that the requisition should be valid it should be proved that all formalities prescribed by the Spanish law have been duly complied with, among others, the registration in the register with serial number provided for by the law, with the making out of an inventory of the ships and the handing over of regular proof of dispossession. All other prescriptions of the Spanish law would be in conflict with Belgian public order

Martiarena against Amaliobeta and Urutia.

Whereas the summons of commitment for trial dated the 20.10.36 extends to it being pleaded as right that the plaintiffs shall again be given possession of the ships Alkari and Lagundu and that the defendants be ordered to evacuate these vessels;

Whereas these, favoured by political disturbances, left the port of Pasajes on 2nd September 1936 in order to

moor at Antwerp, after having experienced difficulties with the competent authorities of the port of Ostend where they had put in, and to be there chained at the instance of the plaintiff;

Whereas it is no longer disputed or can be disputed that the Alkari and Lagundu are the property of the plaintiff and that the documents of ownership produced amply proved this right, the claim is therefore admissible;

Whereas the right of ownership in Spain, notwithstanding the serious events which that country is experiencing, still always remain a fundamental legal principle;

Whereas however Urutia and Amaliobeta, in order to justify the taking possession, invoke a requisition disputed by the plaintiff;

Whereas, in these circumstances, the crucial point of the action is in the examination of the validity of this claim in respect not only of Spanish law but also of Belgian international public order;

Whereas the defendants base their defence mainly on a document dated 2nd September 1936, bearing as heading "Secretariat of Guipuzcoa" and signed by the direction of the Junta and the popular front of Guipuzcoa and by the popular front of the same province, and in which it is stated that the two fishing vessels are "entrusted for the service of defence to the Basque armies of Azpeitia";

Whereas it is thus necessary to find what provisions the Spanish law affects in the present matter, and to what extent these are to be observed in order, in the case of non-application of the essential conditions of a regular requisition, to consider these as not existing and of no value;

Whereas the latest Spanish fundamental law, in art. 44, proclaims ownership and provides for dispossession of same only for reasons of public need but with fair compensation;

Whereas this principle is confirmed in the regulation made by the Ministry of War on the 21.8.1921 (Gazette of Madrid No. 237 of 25.8.21) and by application of the law of 29th June and 11th December 1918;

Whereas, moreover, every application gives right to compensation for the requisitioned objects, and after a written order given in advance (art. 4) which states the nature and duration of the operation, all of this subject to immediate issue of a written acknowledgment of receipt of the requisition;

Whereas this procedure agrees with that of all civilized countries, both in war time and in times of peace, and has

found its inception in the common law of the peoples; whereas these fundamental principles cannot be interfered with by the lawful government of Valencia, as it, as custodian of legality, must be the first, even in time of civil war; to make the application thereof unassailable;

Whereas only a summons made in accordance with the stipulations of the law can give the owner of the requisitioned objects the right to obtain compensation for them, which he may rightly demand;

Whereas the Belgian courts must regard all other expropriations committed outside of the law as having been effected by force and, consequently, as in violation of the natural right of ownership proclaimed by the fundamental Belgian law, and all foreigners in the Kingdom's territory as protected against all reprisal;

Whereas it is not contended that the known declaration made by the political associations was recorded with a serial number in the register specified by the law; whereas it does not give the slightest guarantee as to the date which it bears;

Whereas no inventory of the ship was made either, nor an acknowledgment of dispossession handed over to the plaintiff, so that the latter, for the safeguarding of his rights, is exposed to all arbitrariness, and for eventual later compensation cannot invoke the least legal title;

Whereas any other declaration of the Spanish law would no longer coincide with the Belgian, and with the presence of the property in the Belgian jurisdiction, for the sake of unity of the country's legislation, no other application of this would be possible than that which would allow the plaintiff to claim his property in such circumstances;

Whereas moreover it must be set forth that for the very first time, in a previous action brought before the President of the Commercial Court, and after pronunciation of his order dated the 27.10.36, defendants, holding the opinion that this had not yet been given, made mention for the first time of a requisition;

Whereas, in this connection, it must also be mentioned that the two captains declared at Antwerp before the Water Bailiff that they had put in there through bad weather and to wait for orders from the owner;

Whereas they were unable to produce any title of ownership of their ship, such as art. 63 of the law relating to navigation requires;

Whereas the Belgian Consul at San Sebastian tele-

graphed to the Ministry of Foreign Affairs at Brussels, that both ships left the port of Pasajes on 3rd September and were seized by their crew;

Whereas all these facts and declarations are peculiarly in conflict with the thesis of the plaintiffs;

Whereas, the plaintiffs indeed invoke a declaration by the Spanish embassy from which it would appear that, according to the Spanish law of 1st July 1911 (art. 47 and 65), the Ministry of Finance is not obliged in case of revolution to observe the usual legal formalities;

Whereas in this case it is a question of a legal dispute in the matter of public contracts which do not apply in the present action: whereas, moreover, the interpretation of the foreign law is for the Belgian court a question of fact subject to its sovereign judgment, and which must be in accordance with the national laws;

Whereas, therefore, and without deeper examination of the circumstances in which dispossession took place on the 2nd September, it is established from now onwards that it took place contrarily to the law, and without any observation of the least customary form of Spanish law;

Whereas the defendants invoke the decree proclaimed on the 25th July by the Spanish Government, and of which an extract through the Spanish Embassy in Brussels is to be found in the papers, but whereas this order applies only to chapter V of the law of 1st July 1911 for the administration and accountancy obligations of the public finance, and does not apply in this case;

Whereas the plaintiff rightly remarks that [they] could not put into Belgium for any military purpose, although according to the declaration of the political party "Popular Front" of Guipuzcoa, they have been requisitioned "entrusted to the Basque armies of Guipuzcoa for defence service";

Whereas the Spanish authorities, through the mouth of their representatives in Brussels, mitigated these motives by informing the Minister of Foreign Affairs of Belgium in a note that the Alkari and Lagandu intended to leave the port of Antwerp without cargo, with their papers in order, quod non, and the declaration that they had to secure provisions for Bilbao;

Whereas, from these considerations, it appears that no regular requisition existed at the moment when the said ships left Spanish waters in order to take refuge in Belgium;

Whereas the defendants invoke a telegram dated the 22nd October 1936 in which the Spanish Minister of Foreign Affairs is said to approve the requisitioning of the ships on the 2nd September;

Whereas this act of the Spanish Authorities, taking place ex postfacto cannot acquire any validity in respect of what was, ab initio, in accordance with its own laws, entirely invalid, all the more so as on the date of the telegram there could be no question of a new requisition, as the ships had become beyond the dominion of the Spanish government;

Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, quod non;

Whereas therefore the defendants are, as for themselves and theirs, without any right to the ships of the plaintiff, whereas in addition it is found that the plaintiff is the owner of the ships;

For these reasons:

The Court .....

All other .....

Declares the claim admissible and, as to the main matter, finds that the plaintiff shall be put back in possession of the ships Alkari and Lagundu;

Orders the defendants to free the aforesaid ships and to leave them and to place them at free disposal within eight days reckoned from the signing of this judgment, and in case of failure by the defendants to do so, authorises the plaintiff as from now and above all to then drive them and theirs out with movables and effects and to take proceedings publicly against the latter through the first bailiffs requested so to act;

Places on record for the defendants that, in virtue of the competence and instance, they each assess the action at more than frs. 25,000 nd this in respect of each head.

Declares the judgment executable provisionally notwithstanding opposition or appeal and without security

Orders defendant to pay costs.

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Supreme Court of the United States

OCTOBER TERM 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

(Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant, through Consul Careaga and Proctor Rosenberg, by order to show cause, after final decree entered, why the decree should not be vacated so that he might be permitted to appear as claimant,

Respondent in this Court.

REPLY MEMORANDUM OF PETITIONER.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner.

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Respondent in this Court.

REPLY MEMORANDUM OF PETITIONER.

The statement of facts in respondent's brief is inaccurate and in conflict with the findings of the District Court (R., pp. 258 to 271), which were not disturbed by the Circuit Court of Appeals. The District Court heard all the witnesses testify in open Court, and the appellate court would not of course

under well settled law disturb them. The District Court took the greatest pains in making its findings. Indeed, the Court supported each finding by specific reference to the substantial evidence supporting it (R., pp. 258 to 271). The citations given in respondent's brief show that counsel for respondent have ignored the findings below and have selected excerpts from the testimony of a few witnesses only as the facts in the case. The statement of facts printed on pages 2 to 13 of the petition is strictly in accord with the undisturbed findings of the District Court (R., pp. 258 to 271). The decision of the Circuit Court of Appeals turned on the questions of law whether an alien of a friendly nation residing in this country and in actual possession of his vessel or personal property here can lawfully be dispossessed of such property within the territorial limits of the United States by five of his own insubordinate employees; and whether an owner has the right to resort to the courts of this country to recover possession of his vessel from such insubordinate employees. Process of the court was served on these employees when the vessel was arrested *in rem*. No employee or representative of any foreign government was on board. The vessel had entered this country as a private merchant vessel belonging to such resident alien, and her character as such has remained unchanged. The Circuit Court of Appeals held as matter of law that a supposed "constructive" possession, short of actual possession, of a foreign government might result from a confiscatory order or decree of the foreign country, even though the vessel was within the territorial limits of another country, and that such constructive possession was legal justification for violent seizure of actual possession of the vessel from her private alien

owner within our territorial limits. The decision is anomalous because the seizure here was not by a foreign government but by a few of petitioner's own insubordinate employees. The uncontradicted evidence is that no representative of the Republic of Spain has ever been on board this vessel or has ever presented any credentials or authority to any of petitioner's officers or employees who alone have been on board her. The doctrine announced by the Circuit Court of Appeals is, we submit, without precedent, and, if accepted as law, would encourage resident aliens to resort to violent means of self help to protect themselves against seizure of their personal property in this country by their insubordinate employees.

The paragraph from the opinion of the Circuit Court of Appeals quoted at page 14 of respondent's brief, must be read in the light of the several undisturbed findings of fact by the District Court at pages 258 to 271 of the Record. When this is done, the unrepresentative and misleading character of the quotation, as connected by counsel for respondent (at p. 15 of their brief) with the District Court of New Jersey's opinion in *The Roseric,* is obvious. It is significant that counsel to support his argument was forced to feature a District Court opinion, which opinion, as pointed out (R., p. 336) by the Circuit Court of Appeals in their decision is in square conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909 (R., p. 332).

Point I at page 11 of respondent's brief that the Court was without jurisdiction, is inconsistent with Point IV at page 20 of his brief that "The issue before the Circuit Court was judicial".

Point II at page 14 of respondent's brief is an

effort to support the decision on a ground which is different from the one on which the Circuit Court of Appeals based its decision, and which is contrary to the concurrent findings below and is overwhelmingly disproved by the testimony of every officer and person on board the vessel. Indeed, counsel for respondent formally conceded in the District Court (R., pp. 267-268) that before the forcible, mutinous seizure in New York, any possession was merely "constructive" (R., pp. 267-268). The District Court recites that concession in its opinion (R., pp. 267-268).

Point III at page 17 of respondent's brief is clearly in conflict with the several decisions of this Court mentioned in the Petition if its broad language is intended to mean that an ex parte "decree of confiscation" entered in peace time in a foreign country is legally effective, without institution of judicial condemnation proceedings, to deprive an alien resident of this country of personal property which is in his possession in this country, the alien having been charged with no offense against any law, and no equitable reason for the penalty or forfeiture having been shown.

The contentions of counsel for respondent in their brief are, we respectfully submit, based on a misapprehension with respect to principles of law which are well settled by decisions of this Court, and which are summarized as follows in the most recent authoritative American treatise on the subject (Professor Charles G. Fenwick's "International Law", Second revised edition, 1934, D. Appleton-Century Co., New York):

"In admitting aliens within its territory,

whether as transient visitors or as permanent residents, states assume an obligation to give them a degree of protection which, as a minimum, is represented by the protection which they give to their own citizens. * * * If an injury is done to them, the state is under obligation to permit them to have access to its courts for redress on the same footing as if they were citizens" (at p. 197).

"It is definitely accepted that the exercise of a state's jurisdiction over its citizens is strictly limited to territorial boundaries. Any attempt to extend the control of the state beyond those limits would be an encroachment upon the independence of another state and a serious infraction of international law. But this territorial restriction upon jurisdiction still leaves the state free to assert rights over the citizen which may be made effective if at any subsequent time the citizen should return within the boundaries of the state". (at p. 188).

"This fiction of the "exterritoriality' of vessels, while it finds expression in numerous decisions of British and American courts, has been rejected by most modern writers on the ground that, while it is a convenient explanation of the greater part of the relations which the vessel and persons on board bear to the state of the vessel's flag, it is inconsistent with other relations affecting the vessel both on the high seas and in foreign ports. (The history and inadmissible character of the theory are well set forth in Hall, International Law, §75. In the decision of *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100 (1923), the court dismissed the suggestion that a merchant ship is a part of the territory of the country whose flag it flies as being 'a figure of speech,—a metaphor' " (at p. 218).

"Merchant vessels in foreign ports are not exempt from civil suit *in rem* brought by a citizen of the foreign state, nor are the officers or crew of the vessel exempt from civil suit *in personam* or from criminal prosecution by the foreign government for acts in contravention of the laws of the state" (at p. 222).

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

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Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

BRIEF ON BEHALF OF PETITIONER.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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I.

A. When by its order of March 4, 1937, the Circuit Court of Appeals dismissed the appeal of the Ambassador of Spain from the final decree entered by the District Court in this cause on December 14, 1936, and merely permitted an appeal from the order of the District Court refusing to allow the second application for intervention made on behalf of the Ambassador of the Republic of Spain, the only issue before the Circuit Court of Appeals was whether such a refusal constituted error on the part of the District Court. When, however, the Circuit Court of Appeals decided the case, it did not confine its decision to the sole issue which was before it, but disregarded its order of March 4, 1937, and dealt with the whole case as if the final decree of the District Court was under review, and directed a dismissal of the libel. Apparently the Court took this action on the theory that the allegations made by the Ambassador were conclusive upon it and that it had no power to inquire into the truth or falsity of these allegations 8

B. The allegations contained in the suggestion of the Ambassador were not conclusive. As the State Department had declined to make any representation to the Court as to the ownership of the "Navemar" by the Republic of Spain, the Spanish

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Government was in the same position as any other suitor when it asserted that the vessel was in its possession. Hence to establish a contention that the vessel to which it proposed to file a claim as a proprietor, was immune from judicial process, the Ambassador was under the necessity of offering proof of these allegations..... 12

C.

(1) Luis Careaga, who made the suggestion, was alleged to be an Acting Consul General of Spain. As such he was without authority to make any representation whatever on behalf of the Republic of Spain..... 18

(2) The question whether or not Careaga was clothed with a diplomatic function was a political question and not a judicial question, and in the absence of a decision on that question by the political department of the Government, the Court should have disregarded the application of Careaga..... 18

II. The Republic of Spain sought in its application, called a suggestion, to become a suitor in a Court of the United States, and for that purpose requested leave to file a claim to the Steamship "Navemar" and thereby to assert a proprietary right in that vessel.

The District Court was right in denying such an application, because the Republic of Spain was not in actual possession of the "Navemar", and the Circuit Court of Appeals was in error in holding that "constructive possession" was as efficacious as actual possession for purposes of immunity..... 21

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

BRIEF ON BEHALF OF PETITIONER.

Opinions Below.

The official reports of the opinions delivered in the Courts below are: *The Navemar*, 17 Fed. Supp. 647; *The Navemar*, 18 Fed. Supp. 153 (U. S. D. C., Eastern District of New York); *The Navemar*, 90 Fed. (2d) 673 (U. S. C. C. A. 2).

Jurisdiction of This Court.

On October 11, 1937, an order was filed herein, allowing certiorari, on the petition of Compania Espanola de Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (R. 264). The jurisdiction

of this Court is under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. Code Title 28, Section 347, under Article 3, Section 2, Clause 1 of the Constitution of the United States. The direction of the Circuit Court of Appeals that the libel be dismissed, on the ground that the District Court was without jurisdiction, is a final decree. *The Pesaro*, 255 U. S. 216, at page 217.

Statement of the Case.

The Steamship "Navemar", a vessel registered at Seville, Spain, is owned by the petitioner, a Spanish corporation. After she had discharged the cargo, which she had brought to New York from the Argentine Republic, as a common carrier while being operated for petitioner's account, a Committee of her crew, consisting of Rafael Crespo, Jose Arana, Manuel Freire, Gaspar Lopez and Antonio Sanchez, on December 2, 1936, took physical control of her (R. 169-174), and prevented the owner, the petitioner, from carrying out necessary repairs (R. 28). In that situation, petitioner filed its libel against these men as respondents *in personam* and against the vessel *in rem* (R. 4-7), to secure possession of the vessel. Process was issued and return made (R. 6).

The case was heard by the Honorable Clarence G. Galston, one of the Judges of the United States District Court for the Eastern District of New York. Mr. Hagen, one of the counsel here, appeared at the hearing and stated that he was acting for the Consul General of Spain but had not been able "to contact the Ambassador" (R. 12), and that he "would like it to appear that we do not take any part in the proceedings" (R. 12). Mr. Thomas A. McDonald was retained as counsel by the named respondents, but did not oppose the proceedings (R. 177, 221, 223-225). At the conclusion of the hearing, on December 14, 1936, the Court entered a final decree, adjudging that the petitioner was entitled to the possession of the "Navemar", and directing the Marshal to deliver the possession of the vessel to the petitioner (R. 98). On the same day the Marshal executed the final decree, by boarding the "Navemar" and assembling the crew

aboard on deck, and by reading the final decree to the crew, and by having it thereafter translated by an interpreter into Spanish. The Marshal, in the presence of the master, then informed the crew that the petitioner was in possession of the vessel, and that the master was in charge of the vessel on behalf of the petitioner (R. 99). The master recognized the petitioner as his employer (R. 15, 150), and it is undisputed that everyone aboard the "Navemar" was employed by the petitioner (R. 78).

On December 16, 1936, Mr. Jesse L. Rosenberg, a lawyer in private practice, as Proctor for Fernando de los Rios, Ambassador and Luis Careaga, Acting Consul General of the Republic of Spain (R. 102), obtained an order to show cause from Judge Galston, citing the petitioner to appear in court on the 23rd of December, 1936, to show cause why Fernando de los Rios, Ambassador of the Republic of Spain, should not be permitted to appear in the cause specially as claimant of the Steamship "Navemar", and why the decree entered on the 14th of December, 1936, should not be set aside and vacated (R. 99, 100) to permit such an appearance. At the time the order to show cause was obtained, Mr. Rosenberg presented to the court a suggestion (R. 100-102) signed by him and Luis Careaga (R. 102), in which it is alleged that the Consul General of the Republic of Spain took possession of the Steamship "Navemar" at Rosario, in the Argentine Republic, in the name of the Republic of Spain, under a decree of the Republic of Spain dated the 10th of October, 1936, whereby the said Steamship had become the property of the Government of the Republic of Spain (R. 101).

Answer to the suggestion, and exceptions and objections to the order to show cause were filed (R. 102, 103, *et seq.*). After a full hearing, Judge Galston, on a written opinion (R. 112-116)—*The Navemar*, 17 Fed. Supp. 647—entered an order, dated January 4, 1937, sustaining the exceptions, but with leave to Fernando de los Rios, Ambassador of the Republic of Spain, to present another application if he desired to do so (R. 117, 118).

On January 8, 1937, Mr. Rosenberg, proctor for Fernando de los Rios, Ambassador of the Republic of Spain, presented

to the Court a second application for intervention, accompanied by an affidavit of Luis Careaga (R. 119-127), and obtained a second order to show cause (R. 118, 119). Petitioner made return to the second order to show cause (R. 128), and filed Exceptions and Objections to the Careaga affidavit which was treated as a new suggestion (R. 129-138). With these exceptions, petitioner filed affidavits of the ship's master (R. 138-154), the Chief Steward (R. 155-161), and an affidavit of James W. Ryan (R. 163-164). On the issue thus framed, the District Court handed down its opinion (R. 165-174)—*The Navemar,* 18 Fed. Supp. 153—in which it held that the affidavit of Careaga added nothing to the position assumed by Careaga on his first application. Accordingly, the application was denied without the right to renew.

When the case reached the Circuit Court of Appeals, the appeal was limited by that Court's order of March 4, 1937, to the single question as to whether the District Court had erred in failing to grant the second application made on behalf of the Ambassador of Spain (R. 211). The Circuit Court of Appeals, however, disregarded its order of March 4, 1937 and not only reversed the order of the District Court which denied the second application of the Ambassador, but also directed that the libel be dismissed (R. 233). The case comes here for a review of the decree of the Circuit Court of Appeals.

Findings of the District Court As Dealt With By the Circuit Court of Appeals.

(1) The "Navemar" before the Committee seized the vessel in the territorial waters of the United States, was never in the possession of the Republic of Spain (R. 172).

The Circuit Court of Appeals leaves its finding on this point in some obscurity. If, as stated in its opinion (R. 231), it regarded the allegations of the suggestions as conclusive, then the allegation that the Republic of Spain took possession of the "Navemar" in the Argentine, appears to be the finding of the Circuit Court of Appeals. But the Circuit Court of Appeals seemed to have some doubt as to

the correctness of these allegations, because during its opinion (R. 232), it referred to the alleged control of the Republic of Spain as constructive possession (R. 231-232). As a make-weight at the end of its opinion, the Circuit Court of Appeals enumerated the following circumstances "as evidence of possession": (1) "While the master was at Buenos Aires, the master placed himself at the disposal of the Spanish Consul", pursuant to direct instructions by the Spanish Government. (2) The Consul at Buenos Aires made endorsements on the ship's roll and on the ship's register. (3) The master on December 7, 1936, advised the former owner of the vessel that on October 28, 1936, the Spanish Government had obtained possession, and that since that date he had been generally under orders of the Spanish Government. (4) The master signed a receipt acknowledging that the Spanish Consul had given him $300 as an advance (R. 232, 233). The Circuit Court of Appeals failed to observe, however, that during the same period the petitioner paid the wages of the crew and supplied them with provisions (R. 146, 155, 161, 223, 224).

(2) The "Navemar" was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or control. A foreign nation cannot by edict seize such property within the sovereign domain of another power and claim immunity from suit in the courts of such latter nation. (R. 173).

This finding is not challenged by the Circuit Court of Appeals except as noted under the previous heading, unless the statement in the opinion of the Circuit Court of Appeals, "that a vessel is considered, constructively at least, as a part of the territory of the sovereign whose flag she flies", (R. 231) be considered a challenge.

(3) The Steamship "Navemar" was not an armed vessel and was not a vessel in the public service of the Republic of Spain, and was not possessed by the Republic of Spain nor operated by it (R. 173, 174).

This finding is not challenged by the Circuit Court of Appeals, except as to possession as noted above.

(4) From the time of the edict of October 10, 1936, to the time of the illegal seizure by a Committee of the crew in the waters of New York harbor, the ship was manned by officers and all members of the crew in the employ of the petitioner (R. 174, 78).

This finding is not challenged except as noted above.

(5) The vessel was under charter to Linea Sud Americana, Inc. "On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterers" (R. 174).

This finding was concurred in by the Circuit Court of Appeals (R. 228).

(6) The petitioner was domiciled, so far as domiciling is possible to a corporation, in the United States, and its affairs directed and controlled by its agents residents in the United States (R. 174).

This finding is not challenged.

Specification of Assigned Errors.

1. As the only issue which was before the Circuit Court of Appeals was whether the Final Decree should be vacated to permit the Republic of Spain to intervene as claimant of the "Navemar" in the suit instituted by petitioner against the five respondents *in personam* and against the vessel *in rem*, it was a plain error to dismiss the libel, especially as such a dismissal necessitated the acceptance of the allegations of the suggestions filed on behalf of the Ambassador of Spain as conclusive.

2. The allegations contained in the suggestions were not conclusive, and, as the Department of State of the United States had declined (R. 255, 256) to make any representation to the Court, the Republic of Spain was in the same position as any other suitor. As a suitor, to establish immunity to property claimed by it, the Republic of Spain must offer evidence to prove the facts upon which it relies to establish

immunity. Hence the Circuit Court of Appeals was in error in failing to compel the Republic of Spain to establish by proof the facts upon which it relied to establish immunity.

3. A Counsul General is not a diplomatic officer of a foreign government, and whether any special authority, granted to the Consul General by an Ambassador, is sufficient to clothe the Consul General with diplomatic authority, is a question for the Political Department of the Government, and the Circuit Court of Appeals erred when, in the absence of any representation from the Political Department of the Government, it treated the Acting Consul General of Spain as if he were a diplomatic officer.

4. When a so-called "constructive possession" of the "Navemar" was all that could be shown by the Republic of Spain, such a showing was not sufficient to render a vessel immune from arrest or suit in the courts of the United States, hence the order of the Circuit Court of Appeals directing that the case be dismissed for want of jurisdiction, was erroneous.

5. The master of the "Navemar" had no authority to confer possession of the vessel on the Republic of Spain, since at all times his custody of the vessel was that of an agent of the petitioner, and such custody did not invest him with authority to transfer possession to anyone other than as authorized by the petitioner.

6. The process of the courts of the United States cannot be used by a foreign power for the purposes of making a decree of confiscation effective when the vessel against which the decree of confiscation runs has never been, after the issuance of the decree, within the territorial waters of the confiscating power.

7. The holding of the Circuit Court of Appeals that a vessel is constructively a part of the territory of the sovereign whose flag she flies, is not in accord with the modern authorities and is unsound in principle.

Argument.

The first three of the assignments deal with questions relating to the conclusiveness of the allegations of the Ambassador, and the last four to the question of immunity generally. For this reason we have divided the argument into two parts: Part I deals with the first three assignments and Part II with the last four assignments.

I.

A.

When by its order of March 4, 1937, the Circuit Court of Appeals dismissed the appeal of the Ambassador of Spain from the final decree entered by the District Court in this cause on December 14, 1936, and merely permitted an appeal from the order of the District Court refusing to allow the second application for intervention made on behalf of the Ambassador of the Republic of Spain, the only issue before the Circuit Court of Appeals was whether such a refusal constituted error on the part of the District Court. When, however, the Circuit Court of Appeals decided the case, it did not confine its decision to the sole issue which was before it, but disregarded its order of March 4, 1937, and dealt with the whole case as if the final decree of the District Court was under Review, and directed a dismissal of the libel. Apparently the Court took this action on the theory that the allegations made by the Ambassador were conclusive upon it and that it had no power to inquire into the truth or falsity of these allegations.

On February 3, 1937, a notice of appeal, by Fernando de los Rios, Ambassador of Spain, was served on proctors for the petitioner and upon Thomas A. McDonald, proctor for Manuel Freire, *et al.* (five of whom were the men named as respondents in this cause) and upon Crowell & Rouse, proctors for Robins Dry Dock & Repair Co. (R. 177), under whose libel

the vessel was under arrest at the time of the filing of this suit (R. 250). The appeal was not allowed by the District Court, and on February 3, 1937, Fernando de los Rios, Ambassador of the Republic of Spain, by Jesse L. Rosenberg, his proctor, presented, *ex parte,* to Circuit Judge Martin T. Manton, a petition for leave to appeal to the Circuit Court of Appeals from the final decree entered in the District Court on the 14th of December, 1936, and from the order of January 4, 1937, denying the first application to intervene, and from the order of February 3, 1937, denying the second application (R. 177-178). Judge Manton allowed the appeals as prayed for (R. 178). On the 11th day of February, 1937 (R. 208), petitioner herein served upon proctor for the Ambassador, notice of motion in the United States Circuit Court of Appeals for the Second Circuit in this cause, among other things (1) to vacate the order allowing an appeal from the final decree (R. 187); (2) to vacate the order allowing an appeal from the first order of the District Court declining to permit the intervention sought by the Spanish Ambassador (R. 188); (3) to vacate the order allowing an appeal from the second application for intervention (R. 188). This motion was argued by counsel for the respective parties in the United States Circuit Court of Appeals for the Second Circuit, and printed briefs were filed. On the 4th of March, 1937 (R. 210), the Circuit Court of Appeals entered an order, the pertinent parts of which are as follows:

> "Ordered that the appeal from the final decree of the United States District Court for the Eastern District of New York, entered on the 14th day of December, 1936, be and the same hereby is dismissed, and it is further
>
> Ordered that the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 4th day of January, 1937, conditionally denying intervention, be and the same hereby is dismissed, and it is further
>
> Ordered that the motion to dismiss the appeal from the order of the United States District Court for the Eastern District of New York, entered on the 3rd day of February, 1937, unconditionally denying intervention, be and the same hereby is denied, * * *" (R. 210, 211).

No exception to, nor appeal from, this order has been taken by anyone.

Thereafter counsel for the petitioner received from Mr. Rosenberg and Messrs. Lynch, Hagen and Atkins, counsel for the Spanish Ambassador, a further notice of appeal, in which it was stated that they, as proctors for Luis Careaga, Acting Consul General of Spain, would apply to the Circuit Court of Appeals for an allowance of the appeal from the final decree entered on the 14th of December, 1936, and for an order directing that the notice of second appearance of Luis Careaga be included in the printed record on appeal about to be filed on behalf of Fernando de los Rios (R. 212, 213). Annexed to this notice was an affidavit of Mr. Charles W. Hagen, in which it was alleged: "The libel in this case relates at least in part to a dispute between the officers and five members of the crew of the S/S "Navemar" (R. 214). Reference is made to a treaty between Spain and the United States, Section XXIII (R. 214).* It was alleged in these papers that under the treaty, the exclusive jurisdiction of the said dispute was, lodged with the Consul of Spain. Petitioner filed an affidavit in opposition to this motion (R. 218-226), with exhibits annexed, from which it appeared that all disputes between the petitioner herein and the crew of the "Navemar", including the respondents named in the libel herein, had been finally settled by the payment of wages in full by the petitioner herein on the 16th day of December 1936 (R. 221). On the 18th day of March, 1937, the Circuit Court of Appeals entered an order denying this motion (R. 225). No exception to, nor appeal from this order has been taken by anyone.

The case came on for argument before the United States Circuit Court of Appeals on the only issue remaining before that Court viz., whether the District Court had erred in entering its order of February 3, 1937, denying the second applica-

* In its brief in opposition to the petition for a writ of certiorari, counsel for the Ambassador again advert to this subject and cite *The Belgenland*, 114 U. S. 355. But, as the District Court exercised its discretion to take jurisdiction, and no appeal was allowed from that action, we are unable to perceive the relevancy of the citation.

tion, wherein the Spanish Ambassador sought to become the claimant of the vessel and to set aside the final decree of December 14, 1936. When the Circuit Court of Appeals decided the case, however, it dealt with it as if the decree of December 14, 1936 was before it for review, and, apparently basing its conclusions upon the theory that the Court was "bound to accept the allegations of the suggestion (Affidavit of Careaga, R. 119-127) as conclusive" (R. 231), directed the District Court to dismiss the libel (R. 233). The case comes here, therefore, on a final decree of dismissal by the Circuit Court of Appeals,—*The Pesaro,* 255 U. S. 216, at page 217—notwithstanding the fact that by its own orders the Circuit Court of Appeals had confined its consideration of the case to the question whether the District Court had erred in failing to grant the Ambassador's second application to intervene.

Petitioner asked for a rehearing, which was denied (R. 250, 251).

It should be noted that the Court which directed the dismissal of the libel (R. 226), was differently constituted from the Court which on March 4, 1937, dismissed the appeal from the final decree of December 14, 1936 (R. 210) and from the Court which on March 18, 1937 (R. 225) dismissed the second motion for an appeal from that final decree.

As the only issue before the Circuit Court of Appeals was whether the District Court had erred in entering its order of February 3, 1937 (R. 175), the Circuit Court of Appeals should have confined its decision to that issue and should, at most, have directed that the Ambassador be permitted to file claim and establish, if he could, the facts set forth in the so-called suggestions and affidavit filed by him. After the claim had been filed, both parties should have been given the opportunity to offer such relevant and competent evidence as they desired. Instead of entering an order to permit this to be done, the Circuit Court of Appeals directed that the libel be dismissed, apparently on the theory that the statements contained in the allegations of the suggestions, with the two applications, were conclusive.

B.

The allegations contained in the suggestion of the Ambassador were not conclusive. As the State Department had declined to make any representation to the Court as to the ownership of the "Navemar" by the Republic of Spain, the Spanish Government was in the same position as any other suitor when it asserted that the vessel was in its possession. Hence to establish a contention that the vessel to which it proposed to file a claim as a proprietor, was immune from judicial process, the Ambassador was under the necessity of offering proof of these allegations.

The Department of State of the United States definitely declined to make any representations to the Court as to the rights, if any, of the Republic of Spain to the "Navemar" (R. 255, 256).

Notwithstanding this declination of the Political Department of the Government to assert that any of the facts relied upon by the Ambassador were true, the Circuit Court of Appeals treated the allegations of the Ambassador "as conclusive". It said: "The claim of this public control is borne out by the Ambassador's suggestion and his desire to intervene. The allegations of the suggestion we are bound to accept as conclusive" (R. 231). It is respectfully submitted that this view of the law is in direct conflict with what was held by this Court in *Ex parte Muir*, 254 U. S. 522, at page 532, where this Court said:

> "Merely *to allege* that the vessel was in the public service and *under the control* of the British Government as an admiralty transport was not enough. These were matters *which were not within the range of judicial notice* and needed to be established in an appropriate way." (Italics ours.)

The same question came before this Court in *The Pesaro*, 255 U. S. 216, where the "Pesaro", a vessel owned by the Italian Government, was sued *in rem* in the United States

District Court for the Southern District of New York, to enforce a claim for damage to cargo. The ship was arrested under the usual process issued out of the admiralty side of the court. There was a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and was, therefore, not subject to the court's process. The libellants objected, on the ground that a direct suggestion by the Ambassador was not admissible, and that to be entertained, the suggestion must come through official channels of the United States. This objection was overruled by the District Court, whereupon the libellants appealed direct to this Court. This Court sustained the position taken by the libellants on the ground that before the Court could consider any allegation from the Italian Government, or from a representative of the Italian Government, the Ambassador or the Government must be placed "in the attitude of a suitor", and that only in cases where the United States, through official channels made a suggestion as to the foreign ownership or possession of a vessel, may the Court entertain a suggestion without proof that a vessel is owned or possessed by a foreign sovereign. In the course of its opinion, at 255 U. S. at pages 218 and 219, this Court said:

> "We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *Ex parte Muir*, 254 U. S. 522. And

see *United States* v. *Lee*, 106 U. S. 196, 209. *With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process.*" (Italics ours.)

In *Ex parte Muir, supra,* two methods whereby a foreign government can submit its claim for immunity are indicated, viz., (1) Through official channels of the Government of the United States, and (2) direct to the courts of the United States. At 254 U. S., page 532, this Court said:

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire,* 11 Wall. 164, 167; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Colombia* v. *Cauca Co.,* 190 U. S. 524. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne,* 3 Wheat. 435, 445-446. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange,* 7 Cranch. 116, s. c. 16 Fed. Cas. No. 8,786; *The Pizarro,* 19 Fed. Cas. No. 11,199; *The Constitution,* L. R. 4 P. D. 39; *The Parlement Belge,* L. R. 4 P. D. 129; s. c. L. R. 5 P. D. 197.

But none of these courses was followed. The suggestion on behalf of the British Embassy was presented by private counsel appearing as *amici curiae,* and not through the usual official channels. This was a marked departure from what theretofore had been recognized as the correct practice (see cases last cited); and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision. See *United States* v. *Lee,* 106 U. S. 196, 209. Of course, the suggestion as made could not be given the consideration and weight claimed for it."

The situation in the present case is strikingly like that in *Ex parte Muir, supra.* The suggestion on behalf of the Spanish Ambassador was presented by private counsel, and not through the usual official channels, and the suggestion consisted merely of allegations of control plus a statement that the vessel had been confiscated by the Republic of Spain. See the Suggestion (R. 100) and the Supplemental Suggestion (R. 110) filed with the first application and the Careaga affidavit filed with the order to show cause on the second application (R. 118). The allegations in fact are not as strong as in *Ex parte Muir,* because here it is not alleged that the vessel was under control of the Government "as a transport", as was the case in *Ex parte Muir,* but merely that it was "the intention of (the Spanish) Government to use said vessel for such public purpose" (R. 124).

Nor was the "Navemar" "held and used by a government for a public purpose". *Berizzi Brothers* v. *S. S. Pesaro,* 271 U. S. 562, at page 574. Indeed the "Navemar" was not "held" by any government but by private persons. She had not been used for the purpose of advancing the trade of the Spanish people—*Berizzi Brothers* v. *S. S. Pesaro,* 271 U. S. at page 574. On the contrary, she had been used for the private profit of her owners and charterers who had her in trade between the Argentine and the United States (R. 49, 169, 170, 172). The officers and crew of the vessel were not serving under any agreement with or commission from the Government of Spain; they were serving under a private agreement between the owner, the petitioner here, and themselves (R. 49). The "Navemar's" freights were not earned for the Republic of Spain; they were earned for the charterers Linea Sud Americana, Inc. who collected them from the consignees of the cargo without protest from the Representatives of the Government of Spain (R. 228).

The master of the "Navemar" said:

> "The Spanish Consul General at Buenos Aires told me, however, that he had no instructions whatever with respect to the 'Navemar' and that she should continue her voyage. He said nothing about wishing to take possession or even intending to take possession" (R. 141).

The voyage to which reference was made by the Consul General at Buenos Aires was the voyage which the vessel was making for the benefit of Linea Sud Americana, Inc., a private corporation, and petitioner (R. 140-143). This affidavit was not contradicted and the District Judge for that reason relied upon its allegations in declining to open up the final decree (R. 168-172).

Employment has always been recognized as an essential element in determining whether a vessel is subject to judicial process. In *Ex parte State of New York,* 256 U. S. 503, at p. 510, this Court said:

> "By the law of nations, a vessel of war owned by a friendly power and *employed in its service* will not be subjected to admiralty process; and this upon general grounds of comity and policy. *Schooner Exchange* v. *McFaddon,* 7 Cranch. 116, 144-147." (Italics ours.)

In these circumstances, as was pointed out in *The Pesaro, supra,* the Spanish Government stood in the "attitude of a suitor". As the Court could not take judicial notice of the facts alleged in the suggestion (*Ex parte Muir, supra*), it became necessary for the Spanish Government to establish its claim by proof. Until that was done, we submit, any decree dismissing the libel, such as that directed by the Circuit Court of Appeals (R. 233), was erroneous. Obviously, when there was no proof, nor for that matter proper allegations, that the vessel was "held and used for a public purpose", there could be no immunity.

There is nothing in *Oetjen* v. *Central Leather Company,* 246 U. S. 297, or its companion case, *Ricaud* v. *American Metal Co.,* 246 U. S. 304, cited by the Circuit Court of Appeals, which sustain its statement that the allegations of an Ambassador are conclusive. These cases did not involve any suggestion of an Ambassador, nor any question of judicial notice, other than of recognition by our Government of the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917. Judicial notice of recognition of a foreign

Government is quite a different thing from judicial notice of the allegations of suggestions filed with our courts by counsel for a diplomatic officer of a foreign government, after the Executive Department had declined to accept such allegations (R. 255, 256).

The practice in the English cases is set forth in *The Parlement Belge,* 5 P. D. 197, where objection was made to the jurisdiction by the Attorney General; in *The Jasey* (1906), P. D. 270, where a representation that the vessel was state-owned was made to the Register of the Admiralty Court by the Secretary of State for Foreign Affairs; in *The Porto Alexandre* (1920), P. D. 30, where representation that the vessel was state-owned was made to Lord Curzon, the Secretary of State for Foreign Affairs, who in turn communicated to the trial judge that the vessel was the property of a friendly government.

The only authority, other than the *Oetjen* and *Ricaud* cases, cited by the Circuit Court of Appeals in support of its holding is *The Adriatic,* 258 Fed. 902. That was a decision rendered by the Circuit Court of Appeals for the Third Circuit before this Court decided *Ex parte Muir.* It is of interest to note that the *Adriatic* was cited in support of his argument by the losing counsel in *Ex parte Muir,* 254 U. S. at page 523.

We submit that the allegations of the suggestion were not conclusive, and that the Circuit Court of Appeals was wrong in dealing with the case as if the allegations of the suggestions were conclusive. Moreover, the Court did not have proper proof of the diplomatic character of the persons making the suggestion.

C.

(1) Luis Careaga, who made the suggestion, was alleged to be an Acting Consul General of Spain. As such he was without authority to make any representation whatever on behalf of the Republic of Spain.

(2) The question whether or not Careaga was clothed with a diplomatic function was a political question and not a judicial question, and in the absence of a decision on that question by the political department of the Government, the Court should have disregarded the application of Careaga.

(1) It has long been settled by decisions of this Court that a Consul as such is not clothed with authority to act as a diplomatic agent of his sovereign. See *The Anne,* 3 Wheat. 434, at 445, where this Court, speaking through Mr. Justice Story said:

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially entrust him with such authority; but in such case, his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the Government within whose dominions he assumes to exercise it. There is no suggestion or proof of any such delegation of special authority in this case; and therefore, we consider this claim as asserted by an incompetent person, and on that ground, it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a *charge d'affaires,* in behalf of his sovereign,

would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment."

Recently in the case of *The Sao Vicente*, 260 U. S. 151, at p. 155, this Court took occasion to quote much of the foregoing language and to approve it.

(2) In the present case, after making his first application, which was denied, Careaga filed a certificate stating that a Power of Attorney, clothing him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. "Navemar", was lodged in the Embassy of Spain at Washington. This certificate is signed by the Counsellor to the Embassy and is certified by Careaga and the Counsellor to the Consulate. No certificate or statement of any kind has been made by any political officer of the Government of the United States as to Careaga's status. Under these circumstances we submit that the court should disregard Careaga for the reasons set forth in *The Anne, supra.* Proof of delegation of special diplomatic authority should be made to the political department and until such proof is made Careaga cannot be considered as being clothed with diplomatic authority. See *Doe ex dem. Clark* v. *Braden*, 16 How. 635, at p. 656, where this Court held that it was for the Executive Department of the Government rather than for the Judicial Department, to determine who represents a foreign government. See also *Terlinden* v. *Ames*, 184 U. S. 270.

In *State of Russia* v. *National City Bank of New York*, 69 F. (2d) 44, the Circuit Court of Appeals for the Second Circuit, at page 47, said:

"As to the authority of Foreign Commissar Litvinoff to make the assignment on behalf of his government, there is a presumption of authority in his designation, recognition, and the President's acceptance of the assignment. It is a matter of political action in foreign affairs, and *the question of who represents and acts for a sovereign or nation in its relation to the United States is determined, not by the*

Judicial Department, but exclusively by the political branch of the government. Lehigh V., R. Co. v. *State of Russia, supra; Doe ex dem. Clark* v. *Braden,* 16 How. 635, 656, 14 L. Ed. 1090; Hyde on International Law, Vol. 1, p. 368; *Terlinden* v. *Ames,* 184 U. S. 270, 288, 22 S. Ct. 484, 491, 46 L. Ed. 534." (Italics ours.)

See also *Agency of Canadian Car & Foundry Co.* v. *American Can Co.,* 258 Fed. 363, where the Circuit Court of Appeals for the Second Circuit said (pp. 368-369):

"In the same way the question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government. *In re Baiz,* 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. So that the certificate of the Secretary of State, above referred to, certifying to the official character of Boris Bakhmetieff as the Russian ambassador to the United States is not only evidence, but it is the best evidence, of Mr. Bakhmetieff's diplomatic character, and is to be regarded by the courts as conclusive of the question, and the court could not proceed upon argumentative and collateral proof. And the certificates of Mr. Bakhmetieff, given under his hand and seal as Russian ambassador, concerning the membership and powers of the Russian Supply Committee, must be regarded in like manner as an authoritative representation by the Russian government on that subject, and as such binding and conclusive in the courts of the United States against that government on the matters to which it relates."

For these reasons alone, independently of those which we shall now call to the Court's attention, we submit that the decision of the Circuit Court of Appeals should be reversed, and the decrees of the District Court should be affirmed.

II.

The Republic of Spain sought in its application, called a suggestion, to become a suitor in a Court of the United States, and for that purpose requested leave to file a claim to the Steamship "Navemar" and thereby to assert a proprietary right in that vessel.

The District Court was right in denying such an application, because the Republic of Spain was not in actual possession of the "Navemar", and the Circuit Court of Appeals was in error in holding that "constructive possession" was as efficacious as actual possesssion for purposes of immunity.

A.

In an admiralty suit a claimant is an actor, and is entitled to come before the Court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio. United States* v. *422 Casks of Wine,* 1 Peters 547, at 549.

We respectfully direct the Court's attention to the fact that the circumstance which led to the institution of this suit was the unlawful action of five members of the crew who interfered with the orderly operations of the "Navemar" while she was lying at anchor in New York harbor, in preventing a repair gang from Robins Dry Dock from making necessary repairs (R. 171), which the master had ordered on the petitioner's instruction (R. 171). These men have never appeared in this cause, nor have they given any evidence as to what animated them, nor have they stated that they were acting for any persons other than themselves and the other members of the crew of the "Navemar". It does appear, however, that they were represented by their own counsel, Mr. Thomas A. McDonald (R. 177, 221, 223) and that when the Spanish Ambassador gave notice of appeal in this case,

his proctors served the notice of appeal on Mr. McDonald as proctor for these men (R. 177) as well as on proctors for Robins Dry Dock & Repair Co. (R. 177). It also appears that these men, with other members of the crew, instituted a suit against the "Navemar" for their wages, in which suit petitioner appeared as claimant, and later by a consent decree (R. 223) agreed to the amount of the wages due up to and including December 16, 1936. That decree has been satisfied (R. 224) by the petitioner paying the wages (R. 221) and supplying these men with transportation to Barcelona, Spain. It also appears that none of these men have taken an appeal from the orders and decrees of the District Court in this cause, although they were sued *in personam* and named as respondents in the cause, and were served with process (R. 6).

The existence of these other suits was called to the attention of the Circuit Court of Appeals in the petition for a rehearing (R. 240, 241), and the Court's attention was directed to the fact that the vessel was in the custody of the District Court at the time this suit was commenced (R. 250). Hence when this suit was begun "there was nothing to prevent the vessel from being subjected to attachment under process" in the present case. *Ex parte Whitney Steamboat Corporation,* 249 U. S. 115, at p. 118. Moreover, as was said by this Court in *The Santissima Trinidad,* 7 Wheaton 283, at p. 355 (Story, *J.*):

> "By the seizure and possession of the property under the process of the district court, the possession of the captors was divested, and the property was emphatically placed in the custody of the law."

So also here, by the seizure and possession of the "Navemar" under the process of the District Court in the *Robins Dry Dock & Repair Company* case, the "Navemar" was placed in the custody of the law. In the light of this uncontrovertible fact, how can a serious contention be made that the Republic of Spain was in actual possession of the "Navemar" when this suit was commenced?

So far as the record shows, the Republic of Spain made no effort to file a claim in the Robins Dry Dock & Repair Co. suit,

although if the suit at bar had not been dismissed, this petitioner could have shown that it did file a claim of owner in that case. The Republic of Spain knew of the existence of that suit, because it served a copy of the notice of appeal in this case upon the proctors for the Robins Dry Dock & Repair Co.* (R. 177). Perhaps that circumstance accounts for the fact that only a "part" of the record in the District Court was certified to the Circuit Court of Appeals (R. 184). It did, however, ask leave "to appear as claimant" to the "Navemar" in these proceedings (R. 119). In so doing it asked to come before the court in the character of an actor in virtue of a proprietary interest of the Republic of Spain in the thing in controversy. That such is the significance of a claim in an *in rem* proceeding is elementary, and has been long established. The significance and purpose of a claim in admiralty has nowhere been better stated than by Mr. Justice Story in the opinion of this Court in *United States* v. *422 Casks of Wine*, 1 Peters 547, at page 549, where it is said:

> "The second ground is, that Messrs. Hazard & Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution. The objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio*. It is necessary that he should establish his right to that character as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary instance; if he refuses so to do, it is sufficient a reason for a rejection of his claim."

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* The proper practice in such cases is set forth in *United States* v. *422 Casks of Wine*, 1 Peters 547, at p. 549, where this Court said that where more than one person asserts title to the property, the Court in its discretion may permit a second claim to be interposed in order that the Court may decide to whom the property belongs.

See also Benedict on Admiralty, 5th Edition, §324, at pages 393 and 394.

Counsel for the Spanish Ambassador recognized the need to allege a proprietary interest in order to lay a foundation for their application to file a claim to the "Navemar"; for in the first application the grounds for intervention are stated thus:

> "The said Luis Careaga in his official authority and capacity aforesaid represents to this Honorable Court that in the month of October, 1936, the Consul General of the Republic of Spain at Rosario, Argentine, pursuant to instructions from the General Director of the Spanish Merchant Marine, took possession of the said Steamship 'Navemar', in the name of the Republic of Spain under a decree of the Republic of Spain dated the 10th day of October, 1936, whereby the said Steamship 'Navemar' then and there became and at all times since has remained the property of the Government of the Republic of Spain" (R. 101).

The District Court, correctly followed *Ex parte Muir,* 254 U. S. 522, and held that these allegations were not enough to warrant vacating the final decree. Thereupon a second application for intervention was made by the Ambassador. After the Court had examined the second application, it observed that its allegations were substantially the same as those on the first application (R. 174). As it appeared from the moving papers (R. 119-127), that the only proprietary right alleged depended upon an alleged possession taken at Buenos Aires in the Argentine Republic, the District Court in order to make certain of the intervenor's position had the following colloquy with intervenor's counsel:

> "The Court: Really, I have to get answers to my questions, if you are here as a supplicant.* Unless you are willing to answer my questions, I cannot do anything for you.

* Although the Ambassador was represented by counsel at the outset of the proceedings, he chose to stand by and do nothing until a final decree had been rendered and executed. We submit that his subsequent belated application to intervene in the case could only be regarded as an appeal to the court's discretion; and that the court exercised a very sound discretion in declining to reopen the case on the showing made.

Mr. Atkins: Mr. Ryan has asked the question.

The Court: I want a categorical answer, a definitive answer, to Mr. Ryan's question: When do you claim you took physical possession of that vessel and where?

Mr. Atkins: We took possession—we took it on, I will put it, October 28, 1936.

The Court: Where?

Mr. Atkins: At—we were in possession of it on October 28, 1936.

The Court: When did you take possession?

Mr. Atkins: On October 16, 1936.

The Court: Where?

Mr. Atkins: Wherever the vessel was at that time.

The Court: I don't know where it was.

Mr. Atkins: I don't know.

Mr. Rosenberg: Buenos Aires.

Mr. Atkins: No, she arrived in Buenos Aires on—yes, at Buenos Aires. We gave notice of it on October 28th, and the master recognized it on October 28th, 1936, that possession of the S. S. 'Navemar' was taken by the Spanish Government, and the vessel was confiscated by the decree of October 10th, and that is the master writing to the owners—to the prior owners of the 'Navemar'.

The Court: That is the best answer you can get" (R. 95).

It was also conceded that the only alleged possession which the Republic of Spain took at that time was a "constructive possession" (R. 172). In short the question is not one of immunity; it is whether a foreign sovereign may by its bare declarations obtain possession of a chattel, to which its only claim is a decree of confiscation, when that chattel was first in the possession of its owners and then in the custody of our courts, and when concededly the foreign sovereign never had actual possession of it.

Our Courts have for years recognized, that to render a vessel immune from suit, there must be actual possession of the vessel by a sovereign at the time the suit is brought. Otherwise, to give such a foreign vessel immunity from suit in cases of confiscation, would be to assist a foreign government in enforcing a decree penal in nature, which is contrary to well settled principles of international law. *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, at page 144. That case dealt with the property of King Alfonso,

declared confiscated by the Republic of Spain. The Banco de Vizcaya, as King Alfonso's agent, deposited with Westminster Bank, Ltd., of London, England, certain securities. After the decree of confiscation, the Banco de Vizcaya demanded these securities for the Republic of Spain. The Westminster Bank, Ltd. thereupon filed an interpleader and notified King Alfonso of the demand. The Court held that as the decree of confiscation was penal, it could not be enforced in Great Britain. The Court said:

> "In the words of Lord Loughborough in *Folliott* v. *Ogden* (1789), 1 H. Bl. 124, 135: 'The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.' These words have frequently been cited with approval, and in my judgment they are directly applicable to the present case. I therefore hold that H. M. Don Alfonso and not the plaintiffs is entitled to the securities in question."

The Privy Council in *Huntington* v. *Attrill* (1893), A. C. 150, discusses what constituted a penal law. In the course of its discussion, it referred to this Court's decision in *Wisconsin* v. *The Pelican Insurance Company,* 127 U. S. 265, and quoted the following excerpt from the opinion of Mr. Justice Gray in that case:

> "The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanors, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." (Italics the Courts, p. 157.)

That confiscation is an act of penal justice has been long established. See *The Globe,* 10 Fed. Cas., Case No. 5484, at p. 483, where it is said:

> "Confiscation is either an act of penal justice for the

punishment of great crimes against the state (Bl. Comm. 299), or the exercise of a belligerent right against the property of public enemies (Kent, Comm. 61-66); not the arbitrary seizure of the property of one person, whether citizen or stranger, for the benefit of another person."

In the present case, as in the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, there is little question as to the penal nature of the confiscation. Even if the Ambassador's application should be granted, the petitioner should be permitted to show, if it can, apart from the confiscatory character of the decree, that it is in fact a penal enactment against two alien friends long resident in the United States—Mr. Garcia and Mr. Diaz, the sole two stockholders of petitioner.

B.

Constructive possession by a foreign government of a vessel is not sufficient to render her immune from suit in the courts of the United States.

In *The Davis,* 10 Wall. 15, at page 21, this Court said:

"But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court? The possession which would do this must be an *actual possession* and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." (Italics ours.)

In *Long* v. *The Tampico,* 16 Fed. 491, Judge Addison Brown said, at pages 493 and 494:

"The elaborate and exhaustive examination given to the subject of the exemption of the property of a sovereign power in the cases of *The Exchange,* 7 Cranch. 117; *Biggs* v. *Light-Boats,* 11 Allen (Mass.) 157; and *The Parlement Belge* (1880), on appeal (5 Prob. Div. 197), renders superfluous any further examination of the general principles involved. These cases fully sustain the general proposition that the property of a government, *while in its pos-*

session and employed in or devoted to the public use, is exempt from judicial process, on the ground that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority and the necessities of the public service. In the late case of *The Fidelity,* 16 Blatchf. 569, * * * Waite, *C. J.,* says: * * *

> *'Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use* and must be employed in carrying on the operations of the government.'" (Italics ours.)

In *The Carlo Poma,* 259 Fed. 369, at p. 370, it is said:

> "The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon *the actual possession* by the sovereign of the property at the time process is served. *The Davis,* 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 491; *The Attualita,* 238 Fed. 909." (Italics ours.)

The Carlo Poma was reversed, but on other grounds—see 255 U. S. 219. See also *The Beaverton,* 273 Fed. 539.

In *The Attualita,* 238 Fed. 909, the Circuit Court of Appeals for the Fourth Circuit held that constructive possession was not enough. See also *The Johnson Lighterage No. 24,* 231 Fed. 365.

To sustain its position against this array of authority, the Circuit Court of Appeals relied upon the following cases: *The Roseric,* 254 Fed. 154, a District Court opinion; *The Adriatic,* 258 Fed. 902 (C. C. A. 3), [Both of these cases must be regarded as having been overruled by this Court in *Ex parte Muir,* 254 U. S. 522] and *The Jupiter* (1924) P. 236. We cannot find any language in *The Jupiter* which supports the proposition that constructive possession by a foreign sovereign is enough to render a vessel immune from suit. On the contrary, we find, in the judgment of Bankes, *L. J.* (1924), P. 241, that he relies upon the Court's previous decision in *The Gagara* (1919) P. 95, 101, where the Esthonian Government was in *actual possession* of the ship, and that Govern-

ment stated that the ship was being used by it for public purposes. In *The Jupiter No. 2* (1925) P. 69, it is stated that the master, without the knowledge of the plaintiffs, handed over the "Jupiter" and her papers to a representative of the Union Socialistic Soviet Republics and refused thereafter to recognize the plaintiffs as owners. See also *The Jupiter No. 3*, (1927) P. at p. 129. All three of these cases refer to the fact that when the "Jupiter" was arrested in the first suit, she was in the actual possession of the Soviet Government. In the second and third suits, when the "Jupiter" was no longer in the actual possession of the Soviet Government, the Court passed upon the question of her ownership despite the declaration of that government (1927) P. at p. 138.

The Circuit Court of Appeals evidently felt considerable doubt as to its position, because at the end of its opinion, it mentioned four circumstances which it regarded as constituting some evidence of possession of the "Navemar" by the Republic of Spain.

When we examine the Careaga affidavit, we find an allusion to two only of these four circumstances, viz., those numbered by the Court "Second" and "Fourth" (R. 232-233). The "Second" of these circumstances, is the endorsement by the Spanish Consul at Rosario of the ship's registry and roll (R. 232) and the "Fourth" is the "advance" by the Consul of $300 to the master (R. 233). We shall deal with them in order.

The taking of the ship's roll to a Spanish Consul is routine and is without significance (R. 139). This statement is not denied. So far as the ship's register is concerned, the Consul General of Spain at Buenos Aires requested the master to deposit the register at the consulate (R. 141). The master took the register to him in pursuance of that request. The Consul kept it until the day when the vessel was to sail, and then he redelivered it to the master (R. 22). We are at a loss to understand how any significance as to possession of the "Navemar" can be given under those circumstances to the endorsements placed by the Consul on either of these two papers. Moreover, it is well settled that a ship's register is in-

sufficient to show ownership—*National Oil Transport Co. Inc.* v. *United States,* 18 Fed. (2d) 305; if it is insufficient to establish ownership, of what evidential value, as to ownership or possession, is there in an endorsement upon it? The petitioner never agreed to these endorsements (R. 67).*

As to the "Fourth" circumstance (R. 233), the advance of $300 to the master by the Consul, it is sufficient to say that $300 was but a fraction of the amount paid by the petitioner, as owner, for wages and provisions to take care of the "Navemar" during the period in question (R. 155-161, 223, 224). During the period from December 2, 1936 to December 15, 1936, the petitioner paid $593.81 "for all victuals provision and supplies furnished to the S. S. 'Navemar' and to her officers and crew" (R. 161), and also $3,525, plus transportation to Barcelona, as wages of the crew up to and including December 16, 1936 (R. 223). If payment of money is to be a criterion, the weight is heavily on the side of petitioner. As, however, Mr. Garcia's testimony that all of the crew were in his employ throughout the period under discussion (R. 78) is uncontradicted, it would seem that there should not have been any controversy on this point.

With respect to the first and third proposition (R. 232), which are taken from evidence outside of the suggestion, it is respectfully submitted that these alleged statements of the master are in direct contradiction to an affidavit which the master has made in this case (R. 138-153). But even if the statements should be accepted as establishing any fact, we submit that such facts do not establish change of possession. It has long been settled in this Court that the master of a ship has no power to transfer or otherwise dispose of his employer's vessel, except where the shipowners are beyond "the ordinary means" of communication. See *The Sarah Ann,* 13 Peters 386, at page 401, where this Court, speaking through Mr. Justice Wayne, said:

"The true criterion for determining the occurrence of

* In their brief in opposition to the petition, counsel for the Ambassador cite *The Santissima Trinidad,* 7 Wheaton 283, but as the subject dealt with there was the evidential value of a commission of a public ship of a foreign state, and as no contention has ever been made that the "Navemar" was ever commissioned, the case is clearly not in point.

the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel, in time to direct the master, before she will probably be lost."

See also *The Amelie,* 6 Wall. 18, at page 27, where the Court, speaking through Mr. Justice Davis, said:

"If the master can within a reasonable time consult the owners; he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary."

See *The Yarkand,* 120 Fed. 887, where it is said, at page 891:

"It is settled law that a master has no general authority *virtute officii,* to sell his vessel."

In *The Jupiter No. 3* (1927) P. 122, Mr. Justice Hill, at pages 129, *et seq.,* dealt with the precise question, and at page 135, said:

"It follows that the custody of Captain Lepine was for M. Bourgeois, as it had previously been for Paitre Pelen. Captain Lepine was under the orders of and paid by the administrator for the time being, and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages,* who else could have dismissed him? If he had incurred liabilities for necessaries on account of the ship, who else but the administrator would have been liable *in personam?*

"The result of these considerations is that in March, 1924, when Lepine allowed the U. S. S. R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U. S. S. R., but he betrayed his trust to his employers. *Prima facie* the act of Lepine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His

* It is of interest here to observe that the five respondents against whom the suit was brought by petitioner to regain possession of its vessel, did in fact acknowledge that they were petitioner's servants when they brought suit against petitioner for their wages (R. 223).

right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court."

So also with respect to the possession of the five respondents, members of the crew of the "Navemar". Even if they should assert, which they have not, that they held the "Navemar" for the Republic of Spain, that assertion would be unavailing for the reasons just quoted from the judgment of Mr. Justice Hill in *The Jupiter No. 3* (1927) P. 135. In short, because possession of the vessel had not been handed over to a representative of the Republic of Spain, as was done in *The Jupiter* and not done here, possession of the "Navemar" remained with the petitioner. See Pollock & Wright on Possession in the Common Law, at pages 60 and 138-9.

In cases such as *The Gagara* (1919) P. 95; *The Jupiter* (1924) P. 236 and *The Cristina** (Court of Appeal of England, not yet reported), where actual possession is in a foreign sovereign, the vessel is immune. The reason for immunity in these cases is that a foreign government was, at the time the suit was brought, in actual possession of the vessel. Consequently, process in these cases could not be executed without disturbing the physical control of a foreign sovereign. The mere arrest of the vessel in these cases would have interfered with sovereignty. When, however, as was the case here, the sovereign has no actual possession, but merely a hope or intention of reducing the vessel to actual possession, a suit against the vessel by a private person does not interfere with any control by a foreign sovereign.

We have already shown (pp. 25-26, *supra*) that when an action is brought by a foreign sovereign for the purpose

* *The Cristina* in the Admiralty Division is reported in 59 Lloyds List Rep. 1. That Court held that the ship was in the possession of the Republic of Spain. In the Court of Appeal, Greer, *L. J.*, treated the case as being governed by *The Jupiter* (1924), P. 236, and stated that the suit was to oust the possession of the Spanish Government, hence it could not be allowed. Scott, *L. J.*, said that when the writ was issued, the "vessel was already in the actual possession of the Spanish Government". We are informed that the House of Lords has allowed an appeal.

of enforcing a penalty, such an action is illegal and may not be sustained in the courts of the United States. We shall now show that where the property is owned by an alien friend, a decree of confiscation may never be enforced in our Courts against the property rights of such alien friends.

C.

A title based upon a decree of confiscation may not be asserted beyond the territorial limits of the confiscating power for the purpose of acquiring possession of the thing confiscated as against a lawful owner when such lawful owner is an alien friend.

(1) *The Law in The United States.*

This Court in *Ingenohl* v. *Olsen,* 273 U. S. 541, speaking through Mr. Justice Holmes, said at page 544:

> "If the Alien Property Custodian purported to convey rights in English territory valid as against those whom the English law protects he exceeded the powers that were or could be given to him by the United States."

That case involved the use in Hong Kong, English territory, of certain trade marks of an alien enemy residing in Manila, which had been confiscated by the Alien Property Custodian. The Court held that English law protected a resident of Hong Kong against such confiscation. The Court's holding that English law protects these rights is particularly interesting here, in the light of the case of the Motorship Cabo San Antonio, Appendix A of this brief. In that case the Federal Court of Civil and Commercial Actions at Buenos Aires, in the Argentine Republic, held that the Argentine Government did not regard the confiscation of the "Cabo San Antonio" by the Spanish Government as legal when the vessel was within the territorial waters of the Argentine at the time of the confiscation.*

We find nothing in this Court's decision in *United States* v. *Belmont,* 301 U. S. 324, in conflict with the foregoing.

* Although there is no evidence in the present case of the law of the Argentine Republic, clearly, if the final decree is to be opened up, petitioner should be permitted to offer evidence on that subject, as well as on other subjects relevant to the controversy.

As we understand *United States* v. *Belmont,* there was no one to object to the confiscation, other than a depositary, a debtor, who admittedly had no proprietary interest in the property confiscated. Moreover, the confiscating power had become "vested" with "the substantive right to the money" involved as the successor to the corporation to whom the debtor owed the money, and our own government had undertaken to collect the debt for the confiscating power through official channels of the United States. Nor do we understand that *United States* v. *Belmont, supra,* was intended to modify what was said by this Court in *Clark* v. *Williard,* 294 U. S. 211, at page 213:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts."

In *Cottam* v. *Comision,* 149 La. R. 1026, the Supreme Court of Louisiana held that the constructive seizure of the Steamship "Oaxaca" by the Mexican government while the vessel was in the port of New Orleans, was ineffective as to rights protected by the law of Louisiana.

Cf. Vladikavkazsky Ry. Co. v. *N. Y. Trust Co.,* 263 N. Y. 369.

The District Court found (and that finding is not criticized by the Circuit Court of Appeals) that the petitioner was domiciled in the United States (R. 174). That finding rests upon evidence that Mr. Garcia and Mr. Diaz, the sole stockholders of petitioner corporation had resided in the United States, one for thirty-four years (R. 66), and the other for about thirty years (R. 66), and that the active management of the petitioner is carried on in New York (R. 77). Relying on this evidence, the District Court concluded that the petitioner was entitled to protection as an alien friend (R. 174), citing *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, at p. 489, where this Court said:

> "The petitioner was an alien friend and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing* v. *United States,* 163

U. S. 228, 238; Compare *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 369; *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394, 396; *Truax* v. *Raich,* 239 U. S. 33, 39; *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 411."

It follows, that as the Argentine Law protected petitioner from such confiscation, and as petitioner was an alien friend, our Courts should not aid the Republic of Spain in its attempt to take possession of property alleged to have been confiscated by it.

(2) *The law as generally administered in the civilized countries of the world.*

This Court held in *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.,* 263 U. S. 487, that in questions of marine insurance law, it is important to keep the law of the United States in harmony with that of England. We submit that for like reasons, our law on the subject under discussion should not be permitted to vary greatly from that of the other powers. An examination of the law of the principal countries of the world shows that the decision of the Circuit Court of Appeals cannot be reconciled with their laws:

In the Argentine Republic: In a possessory case, brought by the owners of the Spanish Motorship "Cabo San Antonio" in the Federal Court in the Argentine Republic, it was held, after the Political Department of the Government had declined to intervene or to recognize the confiscation of that vessel by the Spanish Government as legal, that the former owners were entitled to possession. See Appendix A. (Translation ours.)

In England: In *The Jupiter No. 3* (1927) Probate 122, at page 144, Mr. Justice Hill said:

"As to the second question—that is, the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. *If the 'Jupiter' was not within the territory of the R. S. F. S. R., I do not see how the mere passing of a decree could transfer the property.* This seems to me to be recognized

in all the cases: see, for instance, per Atkin, *L. J.*, in *Goukassow's* case (1923), 2 K. B. 682, 693; per Sargant, *L. J.*, in *Segwick, Collins & Co.'s* case in the Court of Appeal (1926), 1 K. B. 1, 15; and per the Lord Chancellor in the latter case in the House of Lords (1927), A. C. 95. The Lord Chancellor treats it as obvious that the property and rights of the company in the countries foreign to Russia are not effectively taken from it by the Russian legislation." (Italics ours.)

Mr. Justice Hill's opinion was adopted *in toto* by the Court of Appeal. See *The Jupiter* (1927) Probate 250, at page 253, and at page 255.

In Belgium: See *Martiarena* v. *Amalibobeta and Urutia,* reported in the Rechtskundig Weekblad (Weekly Law Gazette, published at Antwerp) in the issue of March 7, 1937. A translation of that opinion is annexed to this brief, as Appendix B. (Translation ours.)

In the Netherlands: See *German Reich* v. *Merzbach, et al.* (1925), (Netherlands), Weekly Law Journal (1926), No. 11440, p. 3, (published at The Hague), where there was a question as to the title to some rafts which had been exported from Germany in violation of German law, which provided that no goods could be sent out of Germany without a proper export license, and further that, if they should be so sent out, the goods would be forfeited to the German Reich. The German Reich contended that as soon as the rafts left the German territory without the export license, they automatically became the property of the German Government. Notice of forfeiture was served upon the persons in possession of the rafts while the rafts were within the territorial jurisdiction of the Netherlands. In deciding the case, the Court said, without giving further reasons for its decision:

"* * * as it is contended (by the German Reich) that title passed herein by virtue of the notice * * * its position involves a violation of the sovereignty of the State of the Netherlands, which does not permit that effect be given to the official notice served on behalf of the German Reich on Netherlands territory * * *." (Translation ours.)

In Germany: See Frankenstein, Internationales Privat Recht, Volume II, page 77, where it is said:

> "The *lex rei sitae* on principle also governs the acquisition of title through an act of State." (Citing *The Jupiter* (1927), Probate 250.) (Translation ours.)

In Switzerland: See *Compagnie fermiere de la Grande Chartreuse* v. *Rey,* Tribunal Federal, July 11, 1913, 39 R. O. II, 640, 652, where the Federal Tribunal of Switzerland, in denying the claim of the French liquidators, said:

> "It is not necessary in order to support this view to invoke the odious character of the Law of 1901. * * * It is sufficient to recall that political acts have validity only within the country where they are accomplished and their recognition in foreign countries is opposed, in the absence of special circumstances, to the principle of sovereignty of that state. * * * Admitting even that the French Law of 1901 had certain effects in private law, it nevertheless remains true that they would not be recognized in a state whose public law does not permit the confiscation of the property of individuals." (Translation confirmed by us.)

In France: See *Etat Russe* v. *Ropit,* Trib. Comm. *Marseille,* April 23, 1925 (1925) 52 Clunet 391, where the French Court declined to recognize the title of the Soviet Ambassador as against a Liquidator of the French Court who had been appointed at the request of shareholders, refugee Directors of the Ropit Company, as to property of the Ropit Company situated in France. The Court of Appeal at Aix declared:

> "It is inadmissible that the French state in recognizing the Soviet Government *de jure* is *ipso facto* precluded from refusing to apply any of the provisions of (Russian) law which seem to it contrary to its own conception of national public order." [(1926) 53 Clunet 667, at p. 668.] (Translation ours.)

The case went to the Court of Cassation, and that Court said:

> "Whereas in principle the courts of one state, when they have to pass upon a legal question which has its roots in foreign legislation, must apply foreign law, this rule is obligatory only where the application of foreign law or the

recognition of rights acquired under foreign law do not conflict with the principles or the application of domestic laws essential to the maintenance of public order. * * * Whereas the Soviet decree of January 26, 1918 nationalized the Russian mercantile fleet without just compensation being granted to the dispossessed proprietors, this decree thereby instituted a mode of seizing property which French courts cannot recognize. * * *" [(1928) 55 Clunet 674 at 674-675]. (Translation ours.)

And see *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, at p. 39 where the Court (Cardozo, *C. J.*) pointed out that France had failed to give effect to titles having their basis in decrees of confiscation.

See also *Confiscation: Extraterritorial and Domestic, Borchard, The American Journal of International Law*, Vol. 31, pp. 675-681; *The Recovery of the Foreign Assets of Nationalized Russian Corporations*, 39 Yale L. J. 1130; *Wohl, Nationalization of Joint Stock Banking Corporations in Soviet Russia*, 75 U. of Penn. *Law Review* 385, and *G. C. Cheshire on Private International Law*, pp. 75-78.

Fenwick in his work on international law, well summarizes the prevailing view (Professor Charles G. Fenwick's "International Law", Second Revised Edition, 1934, D. Appleton-Century Co., New York):

"In admitting aliens within its territory, whether as transient visitors or as permanent residents, states assume an obligation to give them a degree of protection which, as a minimum, is represented by the protection which they give to their own citizens. * * * If an injury is done to them, the state is under obligation to permit them to have access to its courts for redress on the same footing as if they were citizens" (at p. 197).

"It is definitely accepted that the exercise of a state's jurisdiction over its citizens is strictly limited to territorial boundaries. Any attempt to extend the control of the state beyond those limits would be an encroachment upon the independence of another state and a serious infraction of international law. But this territorial restriction upon jurisdiction still leaves the state free to assert rights over the citizen which may be made effective if at any subsequent time the citizen should return within the boundaries of the state" (at p. 188).

D.

The holding of the Circuit Court of Appeals that a vessel is constructively a part of the territory of the sovereign whose flag she flies, is not in accord with the modern authorities and is unsound in principle.

In *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, at page 123, this Court referred to the statement that a merchant ship is a part of the territory of the country whose flag it flies, as "a figure of speech, a metaphor."

In *Sharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, at page 127, this Court said:

> "It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative (International Law Digest, Moore, Vol. 1, §174), and to expand the doctrine to the extent of treating seamen employed on such a ship as working in the country of its registry, is quite impossible."

These expressions of the Court are fully sustained by modern authorities. Professor Charles G. Fenwick in his work on International Law, Second Revised Edition 1934, at page 218 said:

> "This fiction of the 'exterritoriality' of vessels, while it finds expression in numerous decisions of British and American courts, has been rejected by most modern writers on the ground that, while it is a convenient explanation of the greater part of the relations which the vessel and persons on board bear to the state of the vessel's flag, it is inconsistent with other relations affecting the vessel both on the high seas and in foreign ports."

All of the cases and text writers cite Hall's discussion on the subject. (Hall on International Law, 8th Edition, edited by A. Pearce Higgins, Whewell Professor of International Law of the University of Cambridge (Oxford) 1924, Sections 76 to 78, inclusive, Part II, Chapter VI, pp. 301 to 307.) Hall

demonstrates that the historic premises on which this entire doctrine rests, are without foundation. The doctrine had its origin in the "Exposition des Motifs" put forth in 1752 by the Prussian Government in justification of its behaviour in confiscating the funds payable to its English creditors in respect of the Silesian Loan. Hall points out that this assertion was supported by no reasoning and by no precedent. He says: "In its origin therefore the doctrine had just so much authority as belongs to a legal proposition laid down by an advocate whose law is notoriously bad." (Hall on International Law, Eighth Edition, pp. 302, 303.) In a footnote at page 304, it appears that the doctrine has been generally rejected by modern writers:

> "The territoriality of merchant vessels is not admitted by Lampredi (Com. dei Pop. Neut. pt. i. §xi), Wheaton (Elem. pt. ch. ii.; §10), Manning (Law of Nations, p. 275, Abdy's ed.), Riquelme (i. 222). Twiss (i. §159), Fiore (pt. ii. ch. v. ed. 1868), Harcourt (Letters of Historicus, No. x), (Bonfils-Fauchille (§§616-18), Despagnet (§267)."

After referring to the writers who have entertained the contrary view, Hall says (Hall on International Law, 8th Ed., at pp. 305, 306):

> "International law indeed as laid down by these writers themselves is inconsistent with the principle which they uphold. It is admitted by the most thoroughgoing assertors of the territoriality of merchants vessels that so soon as the latter enter the ports of a foreign state they become subject to the local jurisdiction on all points in which the interests of the country are touched; that when a vessel or some one on board has infringed the local laws she can be pursued into the open seas, and can be brought back, or the culprit can be arrested there; that in time of war a merchant ship can be seized and condemned for carriage of contraband or breach of blockade. Now it was long ago pointed out that if a merchant vessel is part of the territory of her state she must always be part of it. The fiction is meaningless unless it conveys that a merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the

territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by the custom of exterritoriality, which of course cannot be brought into use as against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign states have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied both by important states and by jurists of weight.

§77. Putting aside the fiction of territoriality as untenable, it may be taken for granted that the jurisdiction exercised by a state over its merchant vessels upon the ocean is conceded to it in virtue of its ownership of them as property in a place where no local jurisdiction exists; this being a reasonable theory, and the only one which enters into competition with the doctrine of territoriality. It only remains therefore to see what are the limits of the jurisdiction thus possessed. As might be expected, it is sufficient to provide for the good order of the seas, and excludes foreign jurisdiction until grave reason can be shown for its exercise."

In conclusion, we beg to call the Court's attention to the fact that no legal possession of the "Navemar" could be acquired by the Republic of Spain in the Argentine for the reasons given in the case of *The Cabo San Antonio* (Appendix A), and that no contention was made in any of the suggestions, or by counsel for the Ambassador of Spain, that any possession was acquired elsewhere than in the Argentine (R. 95, 101, 123). There is no suggestion that the Republic of Spain took possession of the "Navemar" while the vessel was on voyage. At the time of the bringing of this suit the vessel was already in the custody of the law (R. 250), hence she could not have been in the possession of the Republic of Spain when served with process in this suit, *The Santissima Trinidad* (*supra*), 7 Wheaton 283, at p. 355 (*supra*, p. 24). The suggestion that the master may have taken possession of her for the Republic of Spain is refuted by his own affidavit (R. 138-152). Even if he had, the circumstance

that on the day the libel was filed, Careaga attempted to relieve Martinez "from his command as master of the 'Navemar'", and to appoint another master (R. 124), clearly shows that Careaga did not regard Martinez's possession as that of the Republic of Spain. Legally, Martinez's custody was that of the owner. *The Jupiter No. 3* (1927) P. 122, at page 144.

After this suit was brought to oust the five members of the crew, none of them took any steps to defend the case, nor did Martinez assert any right of possession to the ship for the Republic of Spain. Moreover, when the District Court asked the pointblank question of counsel for the Ambassador of Spain as to when and where the Republic of Spain took physical possession, the answer was October 16, 1936 at Buenos Aires (R. 95—*supra* at p. 24). It is clear from this statement that the only taking of possession which is alleged, occurred in the Argentine, and we submit that as that act was illegal in the Argentine (*The Cabo San Antonio*,—Appendix A), it can be given no effect here.

Conclusion.

We submit that because the only subject before the Circuit Court of Appeals for review was whether or not the Spanish Ambassador should be permitted to intervene and file a claim, the Circuit Court of Appeals erred in failing to confine its decision to that subject, and in going further and directing a dismissal of the libel. Moreover, as the vessel was not in the actual possession of the Republic of Spain at any time, there is no question of immunity in the case. The real fact is the Republic of Spain is attempting to inject itself into this suit in order to use our courts for the purposes of obtaining the possession of a chattel to which its only claim is a decree of confiscation of property belonging to alien friends. It is submitted that the foregoing discussion conclusively shows that the Republic of Spain has not any proprietary interest in the "Navemar" which may be recognized by our courts. The suggestion that the decree of confiscation, plus the endorsements and letters of the Consuls, constituted tak-

ing a constructive possession, is without force, especially because one of these elements, viz., the decree of confiscation, offends on its face both the Argentine and American Law (see discussion, *supra*, at pp. 25-27 and 33-35).

The order of the Circuit Court of Appeals reversing the decision of the District Court and directing that the libel be dismissed should be reversed, and the order of the District Court denying leave to the Ambassador of the Republic of Spain to intervene in the suit, should be affirmed, with costs.

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Appendix A.

THE CABO SAN ANTONIO

There is a seal
ARGENTINE REPUBLIC
Legal Documentary Paper 1,340,474

I HEREBY CERTIFY: Having before me the action brought by YBARRA & CIA, SOCIEDAD EN COMANDITA, of Seville, Spain, on an interdict to retain or protect possession of the motorship of Spanish Flag "CABO SAN ANTONIO", before the Federal Court in charge of Dr. Eduardo Sarmiento, of which the undersigned is secretary, that having His Honor the Judge officially requested, under date of May 12, 1937, from His Excellency the Minister of Foreign Affairs and Worship, Dr. Carlos Saavedra Lamas, to send authenticated copy of the resolution dictated by that Ministry on January 14th of the same year, as the result of the steps taken by the Spanish Embassy in order to be given possession of the motorship "CABO SAN ANTONIO", by reason of having been confiscated by the Spanish Government by decree of October 3rd, 1936, the vessel being in Argentine territorial waters since the first of said month and year; His Excellency the Minister sent the copy which is literally transcribed immediately following: "Buenos Aires, January 14th, 1937.—In consideration of the decision rendered by the Legal Counselor Dr. Isidoro Ruiz Moreno, the Ministry of Marine be informed, in reply to its private communication of November 12th, last, that this Chancery, by the reasons stated, does not recognize as legal the confiscation on the part of the Spanish Government of the vessel 'CABO SAN ANTONIO' when the said vessel was anchored in Argentine territorial waters, having been decided to inform the above mentioned Government to this effect, entering the corresponding claim.—Bring the foregoing to the Ministry of Marine with the urgent request of its eventual return. Let these presents serve as a courteous note of delivery—(Signed): Carlos Saavedra Lamas. Copy.—(Signed): Oscar Ibarra García. Under-Secretary of Foreign Affairs"—

In accordance with the aforementioned procedure I issue the present which I sign and seal in the City of Buenos Aires, Capital of the Argentine Republic, this day 18th of November of 1937.——

(Signed) FELIX G. BORDELOIS
There is a stamp seal, which also appears at the margin of the first page.

I HEREBY CERTIFY that the signature immediately preceding, viz.: "FELIX G. BORDELOIS", is authentic and that of the Secretary of Federal Court of Civil and Commercial action, under my charge, and the one used by him in all his acts.— Buenos Aires, November 18th, 1937.

(Signed) EDUARDO SARMIENTO
Federal Judge
There is a stamp seal, which also appears at the margin of the first page.

The Secretary of Foreign Affairs and Worship certifies that the preceding signature, reading Eduardo Sarmiento, is authentic.——

Buenos Aires, 18th of November, 1937.

(Signed) E. OUDRY
By A. Chief of the Desk of Entries Legalizations and Deliveries
There is a stamp seal which also appears all along the border of the document.

Consulate General of the
United States of America

BUENOS AIRES, November 19th, 1937

The foregoing seal of the
Ministry of Foreign Affairs and
Worship and the signature of

E. OUDRY

are hereby certified to be
genuine

(Signed) SYDNEY H. BANASH
Vice Consul of the
United States of America

Service No. 5911
Fee No. 38 $2.00 Equal
to $6.80 Arg. Paper

There is a dry seal on a red paper seal holding down the red silk ribbon which binds the entire document.

Appendix B.

Martiarena v. *Amaliobeta and Urutia*

RECHTSKUNDIG WEEKBLAD (WEEKLY LAW GAZETTE)

7th March 1937, No. 25, 1065.

CIVIL COURT OF ANTWERP

2nd Chamber (bis) 18th February 1937.

President: A. Stellfetd. Judges: Van Mieghem and Jageneau.

Pl. R. Van de Vorst against A. Lilar.

International private law. Claiming of ships by the Spanish government. Conditions of validity in accordance with Belgian international private law.

Two ships which left a Spanish port took refuge at Antwerp. They were claimed there by their owner and chained up. Against this claim it is pleaded that they are said to be regularly requisitioned by the Spanish authorities. Is this requisition valid for Belgian law?

The judgment decides that in order that the requisition should be valid it should be proved that all formalities prescribed by the Spanish law have been duly complied with, among others, the registration in the register with serial number provided for by the law, with the making out of an inventory of the ships and the handing over of regular proof of dispossession. All other preseriptions of the Spanish law would be in conflict with Belgian public order.

Martiarena against Amaliobeta and Urutia.

Whereas the summons of commitment for trial dated the 20.10.36 extends to it being pleaded as right that the plaintiffs shall again be given possession of the ships "Alkari"

and "Lagundu" and that the defendants be ordered to evacuate these vessels;

Whereas these, favoured by political disturbances, left the port of Pasajes on 2nd September 1936 in order to moor at Antwerp, after having experienced difficulties with the competent authorities of the port of Ostend where they had put in, and to be there chained at the instance of the plaintiff;

Whereas it is no longer disputed or can be disputed that the "Alkari" and "Lagundu" are the property of the plaintiff and that the documents of ownership produced amply proved this right, the claim is therefore admissible;

Whereas the right of ownership in Spain, notwithstanding the serious events which that country is experiencing, still always remain a fundamental legal principle;

Whereas however Urutia and Amaliobeta, in order to justify the taking possession, invoke a requisition disputed by the plaintiff;

Whereas, in these circumstances, the crucial point of the action is in the examination of the validity of this claim in respect not only of Spanish law but also of Belgian international public order;

Whereas the defendants base their defence mainly on a document dated 2nd September 1936, bearing as heading "Secretariat of Guipuzcoa" and signed by the direction of the Junta and the popular front of Guipuzcoa and by the popular front of the same province, and in which it is stated that the two fishing vessels are "entrusted for the service of defence to the Basque armies of Azpeitia";

Whereas it is thus necessary to find what provisions the Spanish law affects in the present matter, and to what extent these are to be observed in order, in the case of non-application of the essential conditions of a regular requisition, to consider these as not existing and of no value;

Whereas the latest Spanish fundamental law, in art. 44, proclaims ownership and provides for dispossession of same only for reasons of public need but with fair compensation;

Whereas this principle is confirmed in the regulation made by the Ministry of War on the 21.8.1921 (Gazette of Madrid No. 237 of 25.8.21) and by application of the law of 29th June and 11th December 1918;

Whereas, moreover, every application gives right to compensation for the requisitioned objects, and after a written order given in advance (art. 4) which states the nature and duration of the operation, all of this subject to immediate issue of a written acknowledgment of receipt of the requisition;

Whereas this procedure agrees with that of all civilized countries, both in war time and in times of peace, and has found its inception in the common law of the peoples; whereas these fundamental principles cannot be interfered with by the lawful government of Valencia, as it, as custodian of legality, must be the first, even in time of civil war, to make the application thereof unassailable;

Whereas only a summons made in accordance with the stipulations of the law can give the owner of the requisitioned objects the right to obtain compensation for them, which he may rightly demand;

Whereas the Belgian courts must regard all other expropriations committed outside of the law as having been effected by force and, consequently, as in violation of the natural right of ownership proclaimed by the fundamental Belgian law, and all foreigners in the Kingdom's territory as protected against all reprisal;

Whereas it is not contended that the known declaration made by the political associations was recorded with a serial number in the register specified by the law; whereas it does not give the slightest guarantee as to the date which it bears;

Whereas no inventory of the ship was made either, nor an acknowledgment of dispossession handed over to the plaintiff, so that the latter, for the safeguarding of his rights, is exposed to all arbitrariness, and for eventual later compensation cannot invoke the least legal title;

Whereas any other declaration of the Spanish law would no longer coincide with the Belgian, and with the presence of the property in the Belgian jurisdiction, for the sake of unity of the country's legislation, no other application of this would be possible than that which would allow the plaintiff to claim his property in such circumstances;

Whereas moreover it must be set forth that for the very first time, in a previous action brought before the President

of the Commercial Court, and after pronunciation of his order dated the 27.10.36, defendants, holding the opinion that this had not yet been given, made mention for the first time of a requisition;

Whereas, in this connection, it must also be mentioned that the two captains declared at Antwerp before the Water Bailiff that they had put in there through bad weather and to wait for orders from the owner;

Whereas they were unable to produce any title of ownership of their ship, such as art. 63 of the law relating to navigation requires;

Whereas the Beglian Consul at San Sebastian telegraphed to the Ministry of Foreign Affairs at Brussels, that both ships left the port of Pasajes on 3rd September and were seized by their crew;

Whereas all these facts and declarations are peculiarly in conflict with the thesis of the plaintiffs;

Whereas, the plaintiffs indeed invoke a declaration by the Spanish embassy from which it would appear that, according to the Spanish law of 1st July 1911 (art. 47 and 65), the Ministry of Finance is not obliged in case of revolution to observe the usual legal formalities;

Whereas in this case it is a question of a legal dispute in the matter of public contracts which do not apply in the present action: whereas, moreover, the interpretation of the foreign law is for the Belgian court a question of fact subject to its sovereign judgment, and which must be in accordance with the national laws;

Whereas, therefore, and without deeper examination of the circumstances in which dispossession took place on the 2nd September, it is established from now onwards that it took place contrarily to the law, and without any observation of the least customary form of Spanish law;

Whereas the defendants invoke the decree proclaimed on the 25th July by the Spanish Government, and of which an extract through the Spanish Embassy in Brussels is to be found in the papers, but whereas this order applies only to chapter V of the law of 1st July 1911 for the administration and accountancy obligations of the public finance, and does not apply in this case;

Whereas the plaintiff rightly remarks that [they] could not put into Belgium for any military purpose, although according to the declaration of the political party "Popular Front" of Guipuzcoa, they have been requisitioned "entrusted to the Basque armies of Guipuzcoa for defence service";

Whereas the Spanish authorities, through the mouth of their representatives in Brussels, mitigated these motives by informing the Minister of Foreign Affairs of Belgium in a note that the "Alkari" and "Lagandu" intended to leave the port of Antwerp without cargo, with their papers in order, quod non, and the declaration that they had to secure provisions for Bilbao;

Whereas, from these considerations, it appears that no regular requisition existed at the moment when the said ships left Spanish waters in order to take refuge in Belgium;

Whereas the defendants invoke a telegram dated the 22nd October 1936 in which the Spanish Minister of Foreign Affairs is said to approve the requisitioning of the ships on the 2nd September;

Whereas this act of the Spanish Authorities, taking place ex postfacto cannot acquire any validity in respect of what was ab initio, in accordance with its own laws, entirely invalid, all the more so as on the date of the telegram there could be no question of a new requisition, as the ships had become beyond the dominion of the Spanish government;

Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, quod non;

Whereas therefore the defendants are, as for themselves and theirs, without any right to the ships of the plaintiff, whereas in addition it is found that the plaintiff is the owner of the ships;

For these reasons; The Court

Declares the claim admissible and, as to the main matter, finds that the plaintiff shall be put back in possession of the ships "Alkari" and "Lagundu";

Orders the defendants to free the aforesaid ships and to leave them and to place them at free disposal within eight days reckoned from the signing of this judgment, and in case of failure by the defendants to do so, authorizes the plaintiff as from now and above all to then drive them and theirs out with movables and effects and to take proceedings publicly against the latter through the first bailiffs requested so to act;

Places on record for the defendants that, in virtue of the competence and instance, they each assess the action at more than frs. 25,000 and this in respect of each head.

Declares the judgment executable provisionally notwithstanding opposition or appeal and without security.

Orders defendant to pay costs.

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JAN 7 1938
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

REPLY BRIEF ON BEHALF OF PETITIONER.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,

Respondent in this Court.

REPLY BRIEF ON BEHALF OF PETITIONER.

The statement of facts in respondent's brief is inaccurate and contradicts the findings below, and is inconsistent with the concession made in open court by respondent's counsel in the District Court, that respondent's claimed possession was at most a constructive possession.

The statement of facts at pages 2 to 7 of respondent's brief is inaccurate and ignores and contradicts the specific findings of fact by the District Court, which have not been modified by the Circuit Court of Appeals and which are as follows:

"The question before me is whether in the present showing the moving papers meet the deficiencies which led to the denial of the former application. Exceptions are filed

by the libellant. Briefly these exceptions recite that the moving papers are insufficient in setting forth ownership by the Republic of Spain, possession by the Republic of Spain, public use or operation of the vessel by the Republic of Spain, either in Argentine or in New York, or indeed at any time or place.

Reply affidavits are filed by the libellants. Martinez, the master of the vessel, deposes that neither the Spanish Consul at Rosario nor at Buenos Aires took possession of the 'Navemar' nor did either of them inform him that they wished to take possession of the vessel or had instructions so to do. He alleges that it is the usual practice of Spanish ship masters of privately owned merchant vessels to deposit the ship's roll with the Consul on arriving at a port and receive it back before sailing, the ship's roll being merely a record of the arrivals and sailings of the vessel, together with a record of the kind of cargo carried, passengers and the signing on or enrollment of each member of the crew. The ship's roll is not a document of title nor of possession. Neither is the ship's register a document of title or possession. The register shows the flag or nationality of the vessel as determined by the place where her home port is situated. In the ordinary course of business on arrival at Rosario Martinez deposited the ship's roll with the Consul at that port, which in ordinary course would have been returned to him just before sailing. However, the Consul's office was closed for the day. He was advised by shippers of the linseed cargo at Rosario that although the cargo intended to be shipped had not all yet been loaded, it was imperative that the 'Navemar' sail at once because the water was going down in the river and she would be delayed too long if she did not sail immediately. The shippers agreed to make arrangements to deliver the rest of the linseed cargo to the 'Navemar' when she arrived at Buenos Aires and the representative of the Linea Sud-Americana, Inc., the charterer of the steamship 'Navemar', informed him that he would call at the consul's office at Rosario when it opened the next morning, to obtain the ship's roll and would send it by mail to Martinez, c/o Linea Sud-Americana, Inc., at Buenos Aires. Accordingly the 'Navemar' sailed at 5 P. M., October 23, 1936, without her ship's roll. After the 'Navemar's' return to Buenos Aires, arriving there at 2 P. M. October 24, 1936, he was informed that the Spanish Consul at Rosario had declined to deliver the ship's roll to the agent of the Linea Sud-Americana, Inc., and would deliver it only to the master of the 'Navemar'. Subsequently the Spanish Consul

General at Buenos Aires obtained the ship's register from the master and returned both it and the ship's roll to him. The master noted the endorsement thereon made by the Consul at Rosario and on the register by the Consul General at Buenos Aires. The latter said he had no instructions to make with respect to the 'Navemar' and that she should continue her voyage. Nothing was said about taking possession. The Spanish Consul General at Buenos Aires, however, did tell Martinez to notify Madrid that he was sailing and accordingly Martinez did cable the General Director of Merchant Marine at Madrid, on October 29, 1936:

'Authorized by Consul General here sail for New York. Greetings.

(Signed) Master "Navemar".'

The 'Navemar' is an ordinary commercial type freight steamer, of 9,000 tons cargo carrying capacity. Carrying a general cargo for various private shippers as a common carrier for hire, she had sailed from New York September 11, 1936. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo, the vessel arrived at Buenos Aires on October 9, 1936, left on October 16th, arrived at Rosario October 17th, sailed from Rosario on October 23rd, after having been loaded at Rosario with 5800 tons of linseed in bulk shipped by private shippers to Archer-Daniels Company, a corporation of the United States, to be delivered at Edgewater, New Jersey. Again at Buenos Aires on October 24, 1936, she was loaded with more linseed for the same consignee and with 2200 tons of general cargo shipped by various other private shippers to various private consignees in the port of New York. She arrived at New York at 7 A. M. November 25, 1936, and on November 27, 1936, began to discharge her general cargo at the State Barge Canal Pier in Brooklyn. The vessel then left for Edgewater, New Jersey, and completed discharging the linseed on December 1, 1936. The freight was earned and was payable to the Linea Sud-Americana, Inc. on each and every shipment of the general cargo and on the linseed cargo and each consignee was required to pay freight to Linea Sud-Americana, Inc., before obtaining a delivery order for the cargo. The Linea Sud-Americana, Inc., is a corporation of the United States and was and is a time charterer of the 'Navemar' from the Compania Espanola de Navegacion Maritima, S. A. The time charter still had six months to run. The agents of the owner and of the time charterer in connection with her business in

New York on arrival were Garcia & Diaz, who are the agents and have been such agents of the 'Navemar' since Martinez was captain. They collected the freight from the various consignees on behalf of the time charterer on the occasion of the 'Navemar's' arrival and discharge at New York and Edgewater.

Martinez, when the 'Navemar' arrived at New York in the ordinary course of his duties went to the office of the agents of the ship in New York, Messrs. Garcia & Diaz, and reported the arrival and asked for instructions. He was told to go ahead with the discharge of the cargo in accordance with the charter and the bills of lading, and that the 'Navemar' was still under charter and would make another round voyage to Buenos Aires. Shortly thereafter he took the ship's roll to the Spanish Consul General's office in New York, also in the ordinary course of business, and deposited the ship's roll with him. He pointed out to Mr. Careaga the endorsement that had been made thereon and showed him the cables and radiograms. Mr. Careaga told him that he knew nothing about it and that he had no instructions whatsoever. Mr. Careaga said he would cable Madrid for instructions. Martinez apparently wanted a reply before beginning the discharge of the cargo. 'Then, Mr. Careaga told me to proceed unloading very slowly so that in the meantime he would be able to get some news from Madrid, to which I replied that I could not do anything like that, that the unloading would have to be completed as soon as possible and that it was not up to me to delay it, that we had to discharge as quickly as possible under contract with our consignees.'

Careaga then called the Spanish Ambassador by long distance telephone and afterwards dictated and gave Martinez a letter dated November 28, 1936, wherein it is set forth that in accordance with instructions received from the Ambassador, 'the ship of your command is from this date at the disposition of the government of the Republic and you must await new instructions from him in anything concerning future activities and give me, at the earliest possible moment, a detailed statement of the expenses of said ship such as salaries, victuals, etc., as well as a relation of the repairs of small importance that you are at the present time having effected.'

Martinez reported this to the agents of the owners who told him that Careaga's position was without legal authority and that he was to take instructions only from the owners of the ship. Accordingly he followed the instructions of the owner, the Compania Espanola de Navegacion

Maritima, S. A. and discharged the general cargo and linseed cargo as heretofore stated. Thereafter he made arrangements, acting on instructions from the owner, for repairs to be made by the Robins Dry Dock & Repair Company, which had been requested by the chief engineer of the 'Navemar'.

On December 1, 1936, while the 'Navemar' was still at the pier at Edgewater, five members of the crew approached him on board the 'Navemar' and said that they had been elected by the crew as a committee to take charge of the provisions and the pay of the crew. At 7 o'clock the next morning they left the vessel. At 8 o'clock the same morning, December 2, the 'Navemar' left the pier at Edgewater and proceeded to anchor in the anchorage grounds off Red Hook flats. Martinez then visited Careaga and told him that five men had come to him and said that they had been elected a committee of the crew and that they were asserting authority over provisions and pay which was in excess of any authority under Spanish law or regulations. Careaga said that the committee had already been to see him and he approved of it. Meanwhile Martinez learned that the repair gang from Robins Dry Dock had been prevented by the crew of the 'Navemar', on orders from the so-called committee, from making the repairs which had been ordered off the owners' instructions. Discussion with the crew developed that they said they were acting on instructions from Careaga and a Mr. Diaz. Thereupon Martinez with two members of the committee visited Careaga. Careaga informed the members of the crew that he would make arrangements for provisions to be put on the boat and for payment of the members of the crew, and that the committee would be authorized to control the question of provisions and of pay. Careaga also informed them that repairs would not be made and that anything done on board would be with the knowledge and approval of the committee and that nothing would be done without their knowledge and consent. Martinez protested.

It thus appears that all material allegations and proof are before the court. The affidavit of the Spanish Consul General adds nothing to the position heretofore assumed by him. On the contrary, it is now clear beyond peradventure that prior to the seizure of the steamship 'Navemar' in territorial waters of the United States by the committee of the crew, the steamship 'Navemar' was never in the possession of the Republic of Spain. Pressed at the argument counsel was compelled to concede that at most only a 'constructive possession' could be asserted prior to the seizure

in New York Harbor. Neither under the law of nations nor of local law is authority cited which impels a holding that such 'constructive possession' is the equivalent of physical possession. So far as can be ascertained, certainly in none of the classic cases decided either in the United States or in England, has such an issue been determined" (Opinion District Court, R. 168-172).

"The steamship 'Navemar' was not an armed vessel, was not a vessel in the public service of the Republic of Spain, was not possessed by the Republic of Spain nor operated by it. From the time of the edict of October 10, 1936, to the time of the illegal seizure by a committee of the crew in the waters of New York Harbor, the ship was manned by officers and all members of the crew in the employ of the libellant. The vessel was under charter to the Linea Sud-Americana, Inc. On arrival here its cargo—wholly privately owned—was delivered to the consignees. The freight earned was collected by the master on behalf of the charterer." (R. 173, 174).

There is ample and uncontradicted evidence to sustain each of the Court's foregoing findings of fact. It therefore seems unnecessary to burden the Court with a detailed statement of the evidence.

It is significant that the Circuit Court of Appeals dealt with the case on the footing of the possession claimed being merely a constructive possession (R. 231, 232). It is true that the Circuit Court of Appeals referred to four items of proof "as evidence of possession and control" (R. 232), but it made no finding contrary to that of the District Court on this point, and discussed the legal phases of the case as if there were a constructive possession only of the vessel by the Spanish Government. If the Court had considered that there was an actual physical possession of the "Navemar" by any officer of the Republic of Spain, it is difficult to understand why the Circuit Court of Appeals devoted so much of its opinion to the legal question as to whether or not constructive possession was sufficient to give immunity. The Circuit Court of Appeals and the District Court had before them the letter of the master which is set forth at length in the brief of the respondent here. If that letter constituted proof of actual possession of the "Navemar" by the Republic of Spain,

respondent would have made that contention below. On the contrary, as we have shown above, respondent never made that contention, but conceded that the most for which he could and did contend, was a constructive possession (R. 172). Indeed, in view of the following positive statement contained in the affidavit made by Martinez, it is readily understood why respondent could not, and did not, make the contention that there was any actual possession taken by the Spanish Consul General:

> "Neither the Spanish Consul at Rosario nor the Spanish Consul General at Buenos Aires ever took possession of the 'Navemar' or informed me that they wished to take possession or had any instructions to do so." (R. 139).

The master was at all times in the employ of the petitioner here, and even though he should say that he was holding possession of the vessel for someone else, such a statement would be without effect, because he was a servant of the petitioner, who paid his wages, and any possession which he had was necessarily the possession of the petitioner, and he, of course, had no legal authority to give away or transfer the vessel to anyone else. *The Jupiter No. 3* (1927), P. 122, at p. 135; *The Yarkand,* 120 Fed. 887, at p. 891 (C. C. A. 5).

When all the facts are considered, it becomes apparent that the respondent was well advised when he said that the possession of the Republic of Spain was at most a constructive possession. Captain Martinez testified at the trial (R. 23), that the Spanish Consul General at Buenos Aires, when questioned why he had endorsed the register, stated "That he didn't know anything, he had no news at all about anything".

Also, when the "Navemar" reached New York, and the master presented himself to the charterers, he followed the usual procedure of a privately-owned commercial vessel which enters the port of New York (R. 24).

After arriving at New York, the master reported to the owners of the vessel, the petitioner here (R. 25). The Court, however, declined to permit the master to testify as to what the owners, the petitioner here, did on receiving the report (R. 25).

Mr. Garcia, one of the owners, testified that Compania Espanola de Navegacion Maritima, S. A. was the registered owner of the "Navemar" and that the vessel was registered at Seville, Spain, which was the home port of the vessel; that all of the stock of the corporation, the petitioner here, was owned by himself and Mr. Manuel Diaz, both of whom had been residents of New York for about thirty years (R. 66), and that the active management of the petitioner was "being carried on" in New York (R. 77). Mr. Garcia also testified that all of the persons on board the "Navemar" were in the employ of the petitioner, and that none of them had ever been discharged by the petitioner nor had any of them asked to be discharged from their contract with the petitioner (R. 78). Moreover, the wages of all the crew throughout the period in controversy were paid by petitioner (R. 223-225). The $300 advanced to the master was not for the purpose of paying wages which were due, but for the purpose of reimbursing the master for advances he had made to the crew (R. 151).

Mr. Goyeneche, the ship's steward, stated (R. 158, 159) that Mr. Careaga declined to pay for any of the provisions for any of the men on the "Navemar" and that he was told by the Consul that he should go over to Messrs. Garcia & Diaz and claim for the provisions. He went to Messrs. Garcia & Diaz and presented the claim for victuals and supplies, and Messrs. Garcia & Diaz paid the claim in full (R. 160, 161). The steward stated that he alone received any provisions for any of the crew (R. 160). It also appears that the petitioner gave the men tickets to return to Spain (R. 223, 224).

A serious error appears in respondent's brief at page 5, in which a material part of a sentence is left out in the quotation, and he further mistakenly says that the ship's manifest printed in the record before the Circuit Court of Appeals is not reprinted in the record in this court.

At page 5 of his brief, respondent has fallen into a serious error. After making an incomplete quotation of a sentence

from the manifest, respondent says that the manifest, which was printed at pages 236, 237 and 238 of the record before the Circuit Court of Appeals, is not reprinted in the record before this Court (Respondent's Brief, p. 5). If the respondent had examined the print of the record in this Court, respondent would have observed that pages 236, 237 and 238 of the record in the Circuit Court of Appeals are reproduced in the print before this Court (see pp. 154A, 154B, 154C of the record before this Court). Respondent would have further observed that the words quoted by him are incomplete in that he has omitted the words which we italicize, and that the full quotation is "owned as set forth in the Register *granted at Serilla*". A reference to the testimony of Mr. Garcia (R. 66) and to the register itself, shows that "the owner of the vessel in the register *granted at Serilla*" (Italics ours) was Compania Espanola de Navegacion Maritima, S. A., the petitioner here (R. 66). (Respondent makes the same mistake at p. 30 of his brief.) So far as the manifest is concerned, the ownership it establishes, is that the petitioner was the owner of the "Navemar".

There were no proceedings before the Spanish Consul.

Under the caption "Proceedings in the Courts Below", reference is made to an alleged submission of the case to the Spanish Consul. The record may be searched in vain for any evidence of a submission of the case to the Spanish Consul. The Spanish Consul entered no order of any kind. All that occurred was that "The Master reported the activities of the committee to the Consul and was told that they met with his approval" (R. 228). No suggestion has ever been made until the brief in this Court was filed, that this report constituted a proceeding. The Consul does say that Thomas Pasqual was appointed by him to take command of the "Navemar", but Pasqual was never on board the "Navemar" (R. 160) and never presented any credentials or attempted to take possession, and never appeared as a witness or filed any affidavit or document. Indeed, except for short visits of a Mr. Celestino Diaz (who had no official position—R. 164), there

had been "nobody on board the 'Navemar' excepting the members of the crew who were in the service of the owner Compania Espanola de Navegacion Maritima, S. A. under shipping articles or employment contract which will not expire until her arrival at Barcelona, and excepting the Deputy United States Marshals of the Brooklyn Federal Court" (R. 160).

The treaty referred to in respondent's brief has nothing to do with the issues here. Moreover, as respondent did not file a cross-petition for certiorari this Court has no occasion to consider any question concerning the treaty.

Under Point I of respondent's brief, it is argued that the courts of the United States did not have jurisdiction because of the provisions of Article 21 of the Treaty of Friendship and General Relations between the United States and Spain. Both courts below held that this Treaty had nothing to do with the issues presented by this case (The District Court, R. 174; The Circuit Court of Appeals, R. 230). While the case was pending in the Circuit Court of Appeals, an application was made by Luis Careaga, Acting Consul General for Spain, for leave to appeal from the final decree of the District Court (R. 212), and in support of that application respondent filed an affidavit of Mr. Hagen (R. 213-215), in which the provisions of the Treaty referred to under Point I of respondent's brief are discussed (R. 214, 215). Petitioner filed an affidavit in reply (R. 218) in which it was pointed out that the application for an appeal was made on behalf of an officer who was not a party to the proceeding, and who had not established his right to appear: *Ex parte Cutting*, 94 U. S. 14, at pages 20 to 22; *Guion* v. *Liverpool, London, and Globe Insurance Co.*, 109 U. S. 173; that the Treaty dealt only with disputes between the master, officers and crew, and that there had been no such dispute here, the dispute being between the owner and the crew; that the trial minutes did not support Mr. Hagen's allegations that the District Court had been inconsiderate of Mr. Careaga (R. 220); all that the District Court had done, was to insist

that an appearance be entered and a proper notice of appearance be filed with the Clerk (R. 14, 220); no appearance was ever filed with the Clerk (R. 221), nor was any appearance ever submitted to the Court (R. 221), nor was any exception ever taken to any ruling of the trial court (R. 221). On this state of the record, the Circuit Court of Appeals properly denied the motion to appeal (R. 225). No cross-petition for *certiorari* has been filed in this court with respect to any ruling of either of the courts below. In *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, this Court, speaking through Mr. Justice Brandeis said (at p. 58):

> "We have no occasion to consider this alleged error in the decree as the receiver did not file a cross-petition for certiorari. Compare *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 66; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 331."

See also *Alexander* v. *Cosden Co.*, 290 U. S. 484, at p. 487, and *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, at p. 331, where this Court, speaking through Mr. Justice Stone, in a case where the Collector of Customs of the United States was respondent, said:

> "As certiorari was granted, 286 U. S. 539, on petition of the steamship company alone, only so much of the judgment below as decided in favor of the Collector is brought before us for review."

Therefore, we submit that the argument which runs through the respondent's brief, that there was error below because the courts below failed to deal with the Treaty, is not properly before this Court. Moreover, an examination of the Treaty itself shows, as was found by both courts below, that it has nothing whatever to do with the issues raised by this case. The Treaty relates solely to differences between the Captain, officers and crew, and expressly excepts disorders of a nature likely to cause a breach of the peace. The controversy between the petitioner and the mutinous crew here, was a dispute between the owners and the crew and related to a disorder likely to cause a breach of the peace (R. 68, 69, 75).

The other matters discussed under Point I of respondent's brief have been fully dealt with in our principal brief.

Point II of respondent's brief is an attempt to re-argue *Ex parte Muir*, 254 U. S. 522 and *The Pesaro*, 255 U. S. 216.

Concerning the argument of respondent under his Point II, it is sufficient to point out that this argument is almost identical with the argument made by the party-petitioner in *Ex parte Muir*, 254 U. S. 522. The respondent here relies on *The Roseric*, 254 Fed. 154. That case was cited (at p. 523 of 254 U. S.) by counsel for the losing party in *Ex parte Muir*, to sustain the identical proposition for which it is now cited. Respondent here also relies on *The Parlement Belge*, 5 P. D. 197. That case was cited by counsel for the British Ambassador in *Ex parte Muir*, 254 U. S. at p. 525. Counsel here also relies on *The Adriatic*, 253 Fed. 489; it was relied upon by the losing party in *Ex parte Muir* (254 U. S. 523). So also with *The Maipo*, 252 Fed. 627, cited by the losing party in *Ex parte Muir*, at 254 U. S. p. 523. As to the passage quoted from the opinion of the Circuit Court of Appeals in *The Carlo Poma*, 259 Fed. 369, respondent's brief at page 21, that case was reversed by this Court (255 U. S. 219). It is true that the ground of the reversal was that the Circuit Court of Appeals had no jurisdiction, but this Court in the first sentence of the opinion stated that the case was much like that of *The Pesaro*, 255 U. S. 216. On examination of *The Pesaro*, at pages 218 and 219, we find that this Court reaches diametrically the opposite conclusion from that stated by the Circuit Court of Appeals in the passage quoted in respondent's brief from *The Carlo Poma*, 259 Fed. 369.

The hypothetical cases discussed under Respondent's Point III do not exist here.

Under Point III, respondent sets up two hypothetical cases, neither of which exists here. As we have shown above, the

Treaty has nothing to do with a suit between an owner and his crew. In our principal brief we showed that this is not a suit brought to question the right of the Government of Spain to the possession of the "Navemar". The Government of Spain was not a party-respondent. The only parties-respondents were the five members of the crew. No representative of the Government of Spain was in possession of the vessel, and, as said in *Ex parte Muir,* 254 U. S. 522, at page 532:

> "*Prima facie* the District Court had jurisdiction of the suit and the vessel, *The Belgenland,* 114 U. S. 355, 368-369, and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion."

The English authorities cited at the bottom of page 25 of the brief are not in point, first, because, as pointed out by Judge Ward in *The Carlo Poma,* 259 Fed. 369, the English law varies from our own, and secondly, because in the recent case of *The Cristina,* 59 Lloyds List Law Reports, at page 33, it appears that "actual possession" of a vessel by a foreign government must be shown to defeat jurisdiction. In that case it was shown that after a new master was appointed for the "Cristina", that master went on board and remained in possession. In addition, since that time the Spanish Government paid the wages of the master and crew of the "Cristina". In 59 Lloyd's List Law Reports, at page 47, where the judgments of the Court of Appeal are printed, it appears, at page 48, that at the time the Spanish Consul took possession, the Captain appointed by the owners was not on board, and the new Captain appointed by the Consul was in charge of the vessel and held the vessel, and this was the state of facts at the time the suit for possession was brought. Both Lord Justice Greer and Lord Justice Scott made it clear in their judgments that this actual possession by the Spanish Government constituted the ground for denying jurisdiction. Obviously this must be so, as otherwise it is impossible to reconcile the case with the decision of the English court in the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (1935), 1 K. B. 140, cited in our main brief. If the law were otherwise, a scientist seeking refuge here, might

have his property seized by virtue of a decree of confiscation issued by a foreign government whose jurisdiction he had fled, and might be without a remedy to recover his property thus unlawfully seized. Respondent seeks to draw a distinction between suits for damages and a suit for possession. We are unable to perceive any ground for such a distinction, especially when the vessel was held by employees of the petitioner—(see our principal brief at pp. 31 and 32), and when such employees received their pay from this petitioner, they are estopped to deny that their possession was for any other person than their employer, the petitioner here. *The Jupiter No. 3* (1927), P. 122, at page 135; *The Yarkand*, 120 Fed. 887, 891 (C. C. A. 5).

Point IV of respondent's brief is also an attempted reargument of *Ex parte Muir*, 254 U. S. 522 and *The Pesaro*, 255 U. S. 216, and an attempted abandonment of the concession that at most respondent's possession was a constructive possession.

In Point IV of his brief, respondent again bases his argument on actual possession of the "Navemar" by the Republic of Spain before the vessel arrived in New York, notwithstanding the fact that he had conceded in the court below that the Republic of Spain had "at most only a constructive possession" (R. 172). The argument under this point rests upon the assumption that the allegations of the Ambassador's suggestion are conclusive. We have fully dealt with this argument under Part I of our principal brief. The argument has no validity since the decisions of this Court in *Ex parte Muir*, 254 U. S. 522 and in *The Pesaro*, 255 U. S. 216. As we have stated above, the quotation from the manifest, at page 30 of respondent's brief, relied on to establish ownership, is incomplete and therefore misleading.

Respondent's Point V is merely a reiteration that the allegations of the Ambassador are conclusive.

The argument under Point V of respondent's brief was anticipated in our principal brief, and is merely a reitera-

tion of the contention that the allegations of the Ambassador in his suggestion are conclusive. In his discussion, however, respondent has gone outside of the record in describing what occurred in the *Robins Dry Dock* case. The record here merely shows that the Marshal attached the "Navemar" on the fifth day of December, 1936, and on that day gave "due notice to all persons claiming the same that this Court will, on the 16th day of Dec. inst., at 10.30 A. M. * * * proceed to the trial and condemnation thereof, should no claim be interposed for the same" (R. 247). It was conceded in the Circuit Court of Appeals that the S. S. "Navemar" was under arrest by a process in a libel of the Robins Dry Dock & Repair Company and had been taken into the custody of the Court under such process at the time of the possessory libel herein filed (R. 250). Respondent does not, and cannot, meet the argument contained in our principal brief at pages 22-24, that the "Navemar" could not be in the possession of the Republic of Spain at the time this suit was brought on December 7, 1936, because since December 5, 1936, the vessel was in the possession of the Marshal of the District Court (R. 247). The arrest, therefore, in the present case did not, and could not, dislodge the possession of the Ambassador, because the possession was in the Marshal.

In Point VI respondent in effect concedes that unless the allegations of the Ambassador are conclusive, the Circuit Court of Appeals was without power on the record presented to it to dismiss the libel.

The argument under Point VI of respondent's brief ignores the uncontested fact that the application of the Ambassador was to open up a final decree and to permit the Ambassador to appear as a party-claimant in the cause. It ignores also the plain language of this Court in *The Pesaro*, 255 U. S. 216, at pp. 218, 219, that when a suggestion of a foreign Ambassador does not come "through any official channel of the United States", then the Ambassador to assert any right on the part of his government, must become a suitor, and establish as a suitor whatever right his government may have.

When the United States Government declined to vouch for the statement of the Ambassador by placing the allegation of the Ambassador before the Court "through any official channel of the United States", and when a final decree was entered in the cause, the case was at an end unless the Court should open up the case for a rehearing. This the lower court refused to do, finding that on the showings made by the respondent on the application to reopen or vacate the final decree and defend as respondent, no meritorious defense was set forth. And it was this refusal only that the Circuit Court of Appeals reviewed on appeal, having dismissed the appeal as to the final decree. How, on an application to open up a final decree so that evidence may be offered to sustain a claim of a proprietary inferest in a ship, or any other chattel, a case may be dismissed without admission of any evidence or permitting the party in whose favor the decree was entered, to offer any evidence in rebuttal of any evidence offered by the intervenor, is not made clear. We have searched the books in vain to find that any case, wherein a final decree has been entered, has been dismissed merely on the application of a third party to set aside the final decree so that it might intervene in the suit. At the bottom of page 42 and at the top of page 43, respondent virtually concedes that this action of the Court could only be sustained on the principle that "the District Court would have been bound to accept the allegations of the suggestion as conclusive and could not have inquired by contentious (*sic*) testimony whether the representations were correct or not". By this language he concedes that if we are right in Part I of our principal brief, the action of the Circuit Court of Appeals cannot be sustained (see Part I of our principal brief, pp. 8-20).

With the question of immunity out of the way, nothing remains of respondent's case, for, as was pointed out in *The Jupiter No. 3* (1927), P. 122, the decree of confiscation was without effect as to property like this vessel beyond the territorial jurisdiction of the Republic of Spain. And particularly is that true here, because to enforce that decree here

would involve enforcing a penal statute of a foreign power, which our courts will not do (see our principal brief, pp. 25-27). And to make it worse, would involve enforcing such a decree against an alien friend (*Russian Volunteer Fleet* v. *United States*, 282 U. S. 481), long a resident of this country.

The reference in Appendix C to the alleged violation of a restraining order by us deserves a word. Neither the respondent nor the courts below have ever mentioned the matter before. Why, when a person is sued for wages by his employees, he should be prevented from paying them, is not made clear. But even assuming that an admiralty court had issued such an order, it would have been invalid because admiralty courts, except in cases of limitation of liability, have no authority to issue injunctions. *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454, at pages 457, 458.

CONCLUSION.

The order of the Circuit Court of Appeals should be reversed and the final decree of the District Court should be affirmed, with costs.

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

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Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,
Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,
Respondent in this Court.

MOTION AND MEMORANDUM ON BEHALF OF PETITIONER CONCERNING OMISSIONS AND ERRORS CONTAINED IN SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENT.

T. CATESBY JONES,
D. ROGER ENGLAR,
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Respondent in this Court.

Motion.

Respondent herein having filed a brief entitled "Supplemental Brief on Behalf of Respondent", in which there are several errors and omissions, petitioner moves the Court for leave to file a memorandum concerning omissions and errors contained in the supplemental brief filed on behalf of the respondent.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Petitioner,

By T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel.

Dated, New York, Jan. 12, 1938.

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Respondent in this Court.

MEMORANDUM ON BEHALF OF PETITIONER CONCERNING OMISSIONS AND ERRORS CONTAINED IN SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENT.

1. At pages 2, 3 and 4 of Supplemental Brief on Behalf of Respondent, reference is made to Mr. Justice Bucknill's decision in the Admiralty Court, and the statement is made that:

> "The facts and proceedings in the 'Cristina' are in all material respects similar to those in the case which this Court is now considering, except that the seizure of the 'Cristina' took place in the territorial waters of Great Britain (Cardiff, Wales), whereas the 'Navemar' was in the actual possession of the Republic of Spain before the vessel had arrived in the territorial waters of the United States (Opinion, C. C. A., R. 232)" (Supplemental Brief on Behalf of Respondent, p. 2).

In passing, we submit, that there is not any finding that the "Navemar" was in the actual possession of the Republic of Spain, either before or after she arrived in the territorial waters of the United States.

The following statement of facts, printed in *The Cristina*, 59 Lloyd's List Law Reports 1, at page 3, shows that there is a very material difference between that case and the instant case; and as this statement is omitted from what is printed by respondent, it is reprinted here:

> "Counsel submitted that, apart from any further evidence, the evidence which was before the Court on July 30 was quite sufficient to resolve this case. The position now was that the four vessels with which the Court was concerned had been arrested in this country at the instance of the owners, and on July 14 the Spanish Government dismissed the master of the *Cristina* and appointed a new one. *Since that time the Government, through its agents, had been paying the master and crew of the Cristina, and there could be no doubt that the ship was in the actual possession of the Spanish Government.* That being so, the writ, issued on behalf of the owners, claiming possession of a vessel which was in the possession of the Spanish Government, impleaded the Government, and, on the strength of the authorities, Counsel asked his Lordship to set aside the writ and subsequent proceedings. An attempt had been made to bring into that Court a Government which, in law, could not be required to appear there, as a foreign Sovereign State could not be impleaded." (Italics ours.)

The writ sued out by the owners in the English courts was issued on July 22nd (Supplemental Brief on Behalf of Respondent, p. 8), or eight days after the Master and crew of the "Cristina" had been in the pay of the Government. And as it cannot be denied that petitioner in the present case paid the wages of the crew of the "Navemar" (R. 223-225), and as the record shows without contradiction that all the persons on board the "Navemar" were employees of petitioner (R. 160), the facts in *The Cristina* case are not "in all material respects similar to those in the case" at bar.

There is another important difference between *The Cristina* and the case at bar. It appears in *The Cristina*, as printed

in the supplemental brief on behalf of respondent, that the true captain of the "Cristina" was not on board, and that Captain Asolo, the new captain, was a representative of the Spanish Government, and was in charge of the "Cristina" when the possessory action in that case was commenced (Supplemental Brief on Behalf of Respondent, p. 8). Here it appears that no representative of the Spanish Government was on board at any time (R. 160).

2. At page 3 of Supplemental Brief on Behalf of Respondent, the decree of the Spanish Government of October 10, 1936, is for the first time referred to as a requisition. It is there stated: "In this affidavit (the Careaga affidavit,, R. 127), it is alleged that the 'Navemar' was *requisitioned* by the Spanish Government under a decree issued on October 10, 1936", etc. (Supplemental Brief on Behalf of Respondent, p. 3). (Italics ours.) The word "requisition" as a description of the decree, of October 10, 1936, is in sharp contrast to the words "expropriated" and "confiscation" used on pages 2 and 3 of respondent's main brief to denote the effect of the same decree. An explanation of this change in nomenclature may be found upon examining *The Cristina* case, as printed in supplemental brief on behalf of respondent. We there find that the courts dealt with *The Cristina* as a case of requisition. And in that case the Court was careful to state what it meant by requisition. Lord Justice Scott said:

> "A requisition does not import a change of property" (Supplemental Brief on Behalf of Respondent, p. 7).

Upon examination of the Careaga affidavit, we find two statements that the "Navemar" had "become the property" of the Spanish Government as a result of the decree of October 10, 1936 (R. 123). Also in the suggestion filed with the Court by the Spanish Ambassador, on which the first order to show cause was obtained, a statement is made that as a result of the decree of October 10, 1936, "the steamship 'Navemar' then and there became, and at all times since has remained, the property of the Republic of Spain" (R. 101). These citations establish beyond controversy that here we are dealing

with a case of confiscation which is of a penal nature, whereas in *The Cristina*, the Court was dealing with a requisition which is not penal.

3. It is stated in the Supplemental Brief on Behalf of Respondent:

> "The proceedings in the present case were started by an affidavit of Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, New York (R. 127) who had been duly authorized by the Ambassador to make these representations" (R. 257) (Supplemental Brief on Behalf of Respondent, p. 3).

The fact is that on December 7, 1936, the suit commenced was by a libel for possession directed against certain members of the crew in the employ and pay of petitioner, who had wrongfully seized the vessel (R. 4). Oral testimony was taken in open court (R. 14-78). A final decree was entered on December 14, 1936 (R. 98). On December 16, 1936, a first application was made to open up the default of respondents and to permit the Ambassador to file a claim (R. 99-100). On January 8, 1936, a second application was made to open the default and to permit the Ambassador to file a claim (R. 118-119). We submit that to say that this second application to set aside a final decree of a court, which decree was entered upon proof taken in open court, constitutes starting a proceeding, is a plain abuse of language. This application was addressed to the District Court to open up a final decree entered upon proof. Obviously, to permit opening up such a decree, and to permit further proof, the applicant should make a strong showing. The District Court considered the showing inadequate for the reasons stated in its opinion (R. 165-174), and for that reason, in the exercise of a proper discretion, denied the application.

4. Respondent's counsel at page 4 of his Supplemental Brief, asserts that we have been guilty of "a serious error in quotation" as to the concession which he made in the District

Court. In the opinion of the District Court the following statement appears:

> "Pressed at the argument, counsel was compelled to concede that at most only a (fol. 268) 'constructive possession' could be asserted prior to the seizure in New York harbor" (R. 172).

No application was ever made by the respondent for a correction of this statement of fact appearing in the opinion of the District Court. Obviously, it is improper to suggest that the statement is in any way inaccurate when the suggestion of inaccuracy comes after argument has been completed in this Court. The statement that the Circuit Court of Appeals made a contrary finding, is wholly without foundation (R. 232).

CONCLUSION.

As heretofore stated, the order of the Circuit Court of Appeals should be reversed and the final decree of the District Court should be affirmed, with costs.

Respectfully submitted,

T. CATESBY JONES,
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JAMES W. RYAN.

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Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ANTHONY V. LYNCH, JR.,
CHARLES W. HAGEN,
HORACE T. ATKINS,
Proctors for Respondent, Fernando de los Rios, Spanish Ambassador to the United States of America.

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FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No complete statement of facts is contained either in the petition for writ of certiorari or in the brief in support thereof, and in order to supply the omissions and correct certain inaccuracies we submit herewith the following brief summary of the facts and of the proceedings in the Courts below:

Statement of Facts.

On September 11, 1936, the Spanish steamship "Navemar" sailed from New York. After stopping

at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo she arrived at Buenos Aires on October 9, 1936 (789).

On the 10th day of October, 1936, while the "Navemar" was in Argentina the President of the Republic of Spain issued a decree to the effect that the Republic of Spain expropriated the steamship "Navemar" owned by Compania Espanola de Navegacion Maritima, S. A. for use of the national public service, which decree provided, among other things, that the "Navemar" be managed by the Minister of Communications and Merchant Marine through the General Bureau of Merchant Marine. In said decree it was provided that the decree would become the law of the Government of Spain on publication of the decree in the Gaceta de Madrid. The publication took place on October 11, 1936. The decree provided that the fact of the attachment and "the consequent change of authority" should be noted on the documents of the vessel (545).

At Buenos Aires on October 16, 1936, the master of the "Navemar" received a cablegram from the Director of Navigation of the Republic of Spain informing him of the confiscation of the "Navemar" (72). On receipt of the cablegram, Martinez, the master of the "Navemar", presented himself to the Spanish Consul in accordance with the instructions received from the Director of the Spanish Merchant Marine (77). For the purpose of receiving additional cargo the "Navemar" proceeded from Buenos Aires to Rosario. The master of the "Navemar", Martinez, testified as follows:

> "I proceeded to Rosario. I wrote a letter back to Buenos Aires putting myself again at the dis-

posal of the Spanish Consul General, and proceeded to Rosario, since he gave me no other instructions" (78, 79).

At Rosario he loaded additional cargo consigned to the charterers, Linea Sud Americana, and deposited the ship's roll with the Consul (80). The "Navemar" then left Rosario on advices of the Maritime Commission because of impending low water (82). At the time of departure the Consul's office was closed and the ship departed without her roll and returned to Buenos Aires for additional cargo (83). The master then again reported to the Consul General at Buenos Aires and requested him to arrange to have the ship's roll sent by the Consul at Rosario to the ship's agents at Buenos Aires. The Consul at Rosario did not comply with this request, but instead forwarded the ship's roll to the Consul General at Buenos Aires (85).

The Consul General at Buenos Aires thereupon delivered the ship's roll, together with the ship's register (which during all this time had been in the possession of the Consul General at Buenos Aires), to the master of the "Navemar" (87). At the time of the delivery of these documents the attention of the master of the "Navemar" was called to an endorsement which had been made on each of these documents by the respective Consuls. On the ship's roll the Consul at Rosario made an endorsement, over his signature and official seal, which, translated, reads as follows:

"Through a cable dated 26 of the instant month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936" (555, 556).

On the ship's register the Consul General at Buenos Aires made an endorsement, which translated from the Spanish reads as follows:

> "By cable dated the 15th of October of 1936 to the Spanish Embassy at this capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazette on the date of the 11th of the present month" (103).

As the Consul General at Buenos Aires had not as yet received specific instructions regarding the "Navemar" from the Director of the Merchant Marine at Madrid, he authorized the master to continue his voyage to New York (106). The master of the "Navemar" thereupon cabled the Director of the Spanish Merchant Marine confirming these instructions. The cablegram, translated, reads as follows:

> "General Director of Merchant Marine,
> Madrid
>
> Authorized by Consul General we sail for New York Greetings
>
> Signed MASTER 'NAVEMAR' "

(649).

On October 28, 1936, the "Navemar" sailed from Buenos Aires and on arrival at New York deposited her documents with the Collector of Customs at the Port of New York (650). Among these documents was the ship's register on which appeared the endorsement to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar" (pp. 236, 237 and 238), which were also deposited with the Collector of Customs of the United

States, contained the notation that the "Navemar" was "owned as set forth in the register" (pp. 236, 237, 238). Hence, when the ship entered the Port of New York her documents showed that she was the property of the Republic of Spain.

After arrival at New York the master of the "Navemar" recognized and represented that he was operating the ship for the Republic of Spain even as late as December 7, 1936 (the date on which the libel was filed) when he wrote to the charterers of the ship, Linea Sud Americana, as follows:

> "On October 28, 1936, possession of the SS 'Navemar' was taken by the Spanish Government and the ship was confiscated by decree of October 10 published in the official Gaceta October 11 according to orders which I received at Buenos Aires on October 16, 1936 from the Director General of the Merchant Marine at Madrid.
>
> Since October 28th I have been generally under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires.
>
> Since October 28th. I have been operating under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires. While I was in Buenos Aires, on October 28th., I was shown the original of a letter, dated October 26th., addressed to Messrs. Garcia & Diaz, Ltda., S. A. de Representaciones Maritimas, Sarmientos 329, by the Spanish Consul there, reading as follows:
>
> 'Please be informed by this letter that as per information received from Madrid, through the Spanish Embassy in this Capital, the steamer consigned to you of the Compania Espanola de Navegacion Maritima, S. A. "Navemar"

has been confiscated by the Government of the Spanish Republic; and the Captain of said vessel should follow the instructions that officially he may receive from the corresponding Department.

Which I communicate to you for your knowledge and respective effects.

Yours very truly,

The Spanish Consul in
charge of the Consulate General
AMADOR SANCHEZ'

While at Rosario I presented myself to the Spanish Consul there and he noted on the ship's articles on October 26th, the fact that the ship was now the property of the Spanish Government. Later on October 28th, when I was at Buenos Aires a similar notation was made on the ship's official register by the Spanish Consul there.

I attach photostats of the ship's articles and the ship's register, showing these notations. Since arriving at New York I have presented myself to the Spanish Consul here and he has given me orders that the steamship 'Navemar' *is still to be held at the disposal of the Spanish Government.* With this letter I hand you a copy of the official letter which I have received from the Spanish Consul at New York" (Libelant's Exhibit 7; p. 39).

Prior to the writing of this letter, Martinez, master of the "Navemar", so far recognized the fact that he was acting for the Republic of Spain that he went to Luis Careaga, acting Consul General at New York, and received from him funds to cover wages and advances made by the master for account of the crew.

On receipt of the money he signed the following document:

> "Received from the Honorable Consul General of Spain in New York the amount of $300. as an advance to attend to the expenses of the vessel of my command.
>
> New York, December 2, 1936
>
> MANUEL MARTINEZ
> Master of the Steamer 'Navemar'."

(695).

Proceedings in the Courts Below.

On or about December 3, 1936, a dispute arose between the master of the "Navemar" and the committee* of the crew. After this dispute had arisen the master of the "Navemar", together with two members of the duly elected committee, proceeded to the office of the Consul General of Spain and submitted the dispute to the Spanish Consul in accordance with Article XXIII of the Treaty of Friendship and General Relations between Spain and the United States, 33 Statutes at Large (Part 2) 2105, which provides in part as follows:

> In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such nature as to cause or be likely to cause

* Under the laws of the Republic of Spain (Exhibit 13) committees of the crew are authorized to deal with the master in respect to certain specified details relating to the operation of a Spanish vessel. The five named respondents constituted such a committee on the S. S. "Navemar".

> a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine.

Similar provisions are contained in the Foreign Relations Law, Title 22 U. S. C. A. Articles 256, *et seq.* Therefore, both by treaty and by the law of the United States, the Consul General of Spain had exclusive authority to investigate and determine this dispute between the master and crew of the "Navemar". No provision is made either in the treaty or in the laws of the United States for an appeal to or review by any of the courts of the United States. In fact the treaty specifically provides that the courts of this country shall in no event intervene in such matters unless requested to do so by the representative of the Republic of Spain.

The Consul General of Spain, after hearing both sides of the dispute, concluded that the actions of the committee of the crew were proper and hence entitled to his approval.

Shortly thereafter the master of the "Navemar", Martinez, was relieved of command of his vessel and another master, Tomas Pascual, was appointed by the Consul to take command of the "Navemar" (560).

Despite this determination of the dispute between the master and crew by the Consul, petitioner insti-

tuted an action in the United States District Court seeking, (to quote from p. 9 of the petition herein)

> "to oust from the vessel a group of men who had risen against the master and excluded him from any control over her."

See also libel at folios 19-23.

Process was issued *in rem* against the steamship and this process of the court which ostensibly was issued solely for the purpose of quelling disorder on board a foreign ship (a procedure authorized neither by law nor treaty), was used to oust the Republic of Spain from possession of a vessel, which possession the Spanish Government had obtained prior to the arrival of that vessel within the territorial waters of the United States.

The process was made returnable on December 9th, two days after the libel was filed, and hearings were held forthwith by the District Court. On the return day, the Consul General of Spain, Luis Careaga, appeared specially before the District Court "for the purpose of contesting the jurisdiction of the Court" (fol. 44). Later and before the conclusion of the hearing Mr. Careaga appeared in person and offered to state to the Court his reasons for objecting to the jurisdiction (149, 150) but the District Court refused to hear the Consul or his attorney, Mr. Rosenberg, and stated that they had no standing in the Court and might not be heard (341).

A final decree granting possession of the vessel to the libellant was thereupon entered.

In the meantime the Ambassador, Fernando de los Rios, had made representations to the Secretary of State of the United States. The Secretary of State replied that it was not the policy of this government

to intervene in such matters (fols. 388-389), whereupon the Ambassador authorized Jesse L. Rosenberg to act as attorney for him (see telegram, p. 359 of the record) in the Courts of the United States.

On December 16, 1936, counsel for the Ambassador procured an order to show cause why the default decree should not be set aside and process vacated (433-444). The District Court denied the application in an opinion dated December 31, 1936 (496-521), and an order was entered on this opinion on January 4, 1937.

On January 8, 1937, the Ambassador procured a second order to show cause why his default should not be opened and why he, as Ambassador of the Republic of Spain, should not be permitted to appear as claimant and for such other and further relief as to the court might seem just. By opinion dated January 28, 1937, this second application was denied, and an order was entered on this opinion on February 3, 1937.

The Ambassador thereupon appealed from the final decree in the possessory suit dated December 14, 1936, and from the decisions and orders of the District Court denying the first and second applications to intervene, dated respectively January 4, 1937, and February 3, 1937 (835-839). The libelant (petitioner in this Court) moved in the United States Circuit Court of Appeals for the Second Circuit to dismiss this appeal on February 15, 1937, and on March 4, 1937, the Circuit Court of Appeals entered an order allowing the appeal from the order denying the second application to intervene and dismissing the appeal from the final decree on default and from the order denying the first application to intervene.

In due course the appeal was argued and the order of the District Court denying the second application of the Ambassador to intervene was reversed by the Circuit Court with directions to the District Court to enter an order dismissing the libel for lack of jurisdiction.

I.

The Circuit Court of Appeals correctly decided that on the facts of this case, the libel should be dismissed for want of jurisdiction.

The libelant is a Spanish Corporation, all of whose stockholders and directors are citizens of the Republic of Spain; the "Navemar" is a Spanish vessel; the five respondents are Spanish citizens; the Republic of Spain itself claims title and the right to possession of the "Navemar".

In *The Belgenland,* 114 U. S. 355, 360, this Court said that in cases involving disputes between citizens of a foreign state, "on general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is a special reason for doing so, and will require the foreign consul to be notified, and though not absolutely bound by, will always pay due respect to his wishes as to taking jurisdiction".

Inasmuch as the District Court was taking jurisdiction of such a controversy without first notifying the Consul General of Spain and without inquiring as to his wishes as to taking jurisdiction, Luis Careaga, Acting Consul General of Spain, appeared specially "for the purpose of contesting jurisdiction of this Honorable Court" (fol. 44). The court on the insistence of counsel for the libelant, proceeded with

the hearing over this objection by the Consul General of Spain. Subsequently and before the conclusion of the hearing, Mr. Careaga appeared in person before the District Court and offered to consult with the court in Chambers (149-150). At the close of the hearing and before a decree had been entered, Mr. Rosenberg, appearing for Mr. Careaga, requested the courtesy of a hearing.

The District Court refused to "pay due respect to his wishes as to taking jurisdiction", and refused to hear the Consul or his attorney (341, 342).

Thereafter, the Ambassador sought to intervene as claimant of the "Navemar".

In *The Pesaro,* 255 U. S. 216, and in *Ex parte Muir,* 254 U. S. 522, this Court pointed out three permissible and adequate forms of procedure by which the question of jurisdiction could be raised. They are as follows:

First: If the foreign sovereign deems it inadvisable to appear in the courts of the United States, a diplomatic representation can be made to the Department of State to the end that the Attorney General will file a suggestion of immunity;

Second: The government itself, as of right, "is entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question";

Third: The accredited and recognized representative may appear and take the same steps in the foreign government's interests.

The first of these is purely diplomatic. The Ambassador, deeming the matter diplomatic rather than judicial, had addressed a note to the Secretary of

State and in due course had received the reply which appears at folios 388, 389 of the record.

Thereafter the Ambassador sought to appear as claimant of the ship in the manner prescribed by the court in *The Pesaro,* and *Ex parte Muir.*

The decision of the Circuit Court is not (as stated by petitioner herein) based on a mere suggestion by the Ambassador, but on the facts of this case, which the libelant itself put in evidence and which establish that, when the "Navemar" arrived at New York she was in the possession of the Republic of Spain and her official documents so indicated (Opinion, fol. 363).

In the *Santissima Trinidad,* 20 U. S. 283, at page 334, Mr. Justice Story said:

> "In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not required to be produced. Nor will the courts of a foreign country inquire into the means by which the Title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission therefore of a public ship when duly authorized, so far, at least, as foreign courts are concerned, imparts absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been settled practice between nations; and, as a rule founded in public convenience and policy, cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

Both the District Court at page 267 and the Circuit Court at page 336 have found that all the necessary proofs are before the Court. The Circuit Court, disagreeing with the District Court, has found as a matter of law, that on these proofs it has been established beyond question that the "Navemar", at the time of her arrival in United States waters, was in the actual possession of the Republic of Spain. Hence, since the property of a sovereign is immune from process in the courts of another sovereign, the Circuit Court directed that the libel be dismissed for lack of jurisdiction.

II.

Whether or not constructive possession is sufficient to permit a foreign sovereign to claim immunity for a vessel is not an issue in this case for the reason that the Circuit Court of Appeals has specifically found that the Republic of Spain had actual possession of the "Navemar".

The Circuit Court of Appeals, after deciding that, on the facts of this case, constructive possession of the "Navemar" for the purpose of immunity would be as efficacious as actual possession asserted through the Government's own officers, said:

> "Moreover, we have here as evidence of possession and control first that, while at Buenos Aires, the master placed himself 'at the disposal of the Spanish Consul' pursuant to direct instructions by the Spanish Government; second, that the Consuls at Buenos Aires and Rosario made endorsements on the ship's registry and roll of which the master was aware and which claimed the 'Navemar' as property of the Spanish Gov-

ernment; third, that the master on December 7, 1936, advised the former owners of the vessel that on October 28, 1936 the Spanish Government had obtained possession of the 'Navemar' and that since that date he had been 'generally under orders of the Spanish Government' as given him by the Consul at Buenos Aires; fourth, that on December 2, 1936, the master signed a receipt acknowledging that the Spanish Consul in New York had given him $300. as an advance to attend to the expenses of the vessel."

In *The Roseric,* 254 Fed. 154, 160 (D. C. N. J.), the Court, after discussing the effect of the presence of the owner's crew on a vessel after requisition by the British Government, said:

"The contention of libelant that, as the ship's officers and crew operated the 'Roseric', she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the 'Roseric' and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.

* * * Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

> In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy."

So, too, in Hyde, International Law, Volume I, page 445:

> "In such case the dedication of the ship to public service would seem to render the constructive possession of the sovereign as efficacious for purposes of exemption as actual possession manifested by the assertion of control through the medium of its own officers."

See also:

The Adriatic, 258 Fed. 902 (C. C. A. 3).

The statement by petitioner that the decision of the Circuit Court of Appeals in respect to possession is in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, is incorrect and the incomplete quotation from that decision is misleading. We shall quote from *The Davis,* at page 21, and shall italicize so much of the quotation as has been omitted in the petitioner's brief.

> "But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the Court? The possession which would do this must be actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. *We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter*

should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

III.

The decision of the Circuit Court of Appeals with respect to the effect of a decree of confiscation is not contrary to international law.

Under Point III of the Petition at page 29, proctors for the petitioner state that the decision of the Circuit Court of Appeals to the effect "that a decree of confiscation is effective when the property confiscated is entirely outside of the territorial limits and jurisdiction of the confiscating power, and in the possession of its owner, is without precedent". We respectfully submit that no such broad and comprehensive postulate has been made by the Circuit Court and that the construction which counsel have placed upon the decision below is incorrect.

The controversy neither warrants nor invites a conclusion so untenable and we are concerned merely with the effect of a sovereign decree upon a vessel owned and operated by citizens of that sovereign state. There can be no question about the right of a

sovereign to requisition ships of the flag and such requisition can be made effective not only on the high seas, but also in the waters of another state.

In this view of the case the Circuit Court stated at page 7 of the opinion:

> "One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. *U. S.* v. *Rodgers,* 150 U. S. 249; *The Scotland,* 105 U. S. 27; *Wilson* v. *McNamee,* 102 U. S. 574; *Crapo* v. *Kelly,* 83 U. S. 610; *E. B. Ward Jr.,* 17 Fed. 456 (C. C. La.)."

The Circuit Court has found, therefore, not that the "Navemar" was "entirely outside of the territorial limits" of the Republic of Spain, but that the vessel was itself for purposes of sovereign jurisdiction a part of the territory of Spain, for as stated by Wheaton on International Law: "Every state claims to exercise jurisdiction over its own merchant vessels wherever they are and even when they are in the waters of another state."

In *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, this Court had for consideration the effect of the National Prohibition Act in respect to vessels under the United States flag. The act, by its terms, was limited in operation to the territory and territorial waters of the United States. After deciding that the operation of the act by its terms was limited to the territorial waters, the Court said, at page 129:

> "In so saying we do not mean to imply that

> Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them." *Lord* v. *Goodall, N. & P. S. S. Co.,* 102 U. S. 541, 26 L. ed. 224; *The Abbey Dodge,* 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310.

Professor Holdsworth in an article entitled "The Power of the Crown to Requisition British Ships in a National Emergency", appearing in Vol. 35 of the Law Quarterly Review, states that this result is based on the theory of allegiance and reaches the following conclusion after a careful review of the authorities:

> "It follows, therefore, that the prerogative of the Crown to requisition a British ship is not ousted merely because she is in a foreign port. Unless the authorities of the foreign country intervene, the owners of such a ship must obey the requisition, and act illegally if they do not."

This authority recognizes the inherent power of a foreign sovereign to intervene but it is well established that a foreign state will take jurisdiction of the vessel of another only when the vessel itself has done a wrong, for as the Court said in *Rex* v. *Lesley* (1860), 29 L. J. M. C. at page 101:

> "Although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof."

See also *The Queen* v. *Anderson* (1868), L. R., 1 Q. C. R. at page 165.

To the same effect Mr. Justice Sutherland in *U. S.* v. *Belmont,* 81 Law Ed. 715, at page 719, said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

The cases cited by the petitioner, such as *The Jupiter No. 3* (1927) Probate 122, and *Martiarena* v. *Amaliobeta* in the civil court at Antwerp, printed as an appendix to petitioner's brief, are not in point. The issues in both were between private litigants, in which the question of sovereign immunity from jurisdiction was not involved, and the decisions thereunder are not in conflict with the principles enunciated by the Circuit Court of Appeals and supported by the applicable decisions of this country in *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304; *The Adriatic,* 258 Fed. 902 (C. C. A. 3).

IV.

The issue before the Circuit Court was judicial; it did not rest upon diplomatic representation and was properly presented.

Throughout the petition and brief, proctors for the petitioner have endeavored to create the impression that there has been in this case a delegation of diplomatic functions and duties by the Ambassador to

Luis Careaga. For example, at the bottom of page 31 it is stated that "Careaga filed a certificate stating that a Power of Attorney, clothing him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. 'Navemar' was lodged in the Embassy of Spain at Washington". This statement is not in accordance with the facts and is most misleading. The Power of Attorney speaks for itself and a translation of this Power of Attorney will be found at page 363 of the Record. The Ambassador had acted in a diplomatic capacity only when he made representations to the Secretary of State of the United States. When the Secretary of State advised the Ambassador that it is not the practice of the State Department to take any action which might constitute an interference by the executive authorities of this Government with regard to the merits of a controversy and that the Spanish Government had the right "to appear directly before the Court in a case of this character", the Ambassador, without waiving any of his privileges and immunities, petitioned the Court for leave to file claim to the "Navemar" (p. 179). In other words, the Ambassador was seeking to become a party to the litigation and "to propound his claim to the vessel and to raise the jurisdictional question". *Ex Parte Muir,* 254 U. S. 522. Obviously the Ambassador, just as any other litigant, not only was entitled to employ counsel to represent him but to delegate to others the purely ministerial acts which of necessity had to be performed in order to present his claim to the "Navemar" before the Courts of the United States.

We submit that since the instant case is between a friendly foreign sovereign and a private Spanish litigant who, by invoking judicial process of the United States, sought to secure possession of a Spanish vessel,

the procedure was judicial and the manner in which the Ambassador appeared was in conformity with *Ex Parte Muir*. We further submit that the cases cited by petitioner under Point IV of petitioner's brief, which cases involved diplomatic representations between the political branches of two governments, have no bearing on the issues now before the Court.

Conclusion.

All of petitioner's arguments overlook the findings of fact of the Courts below which were based on the evidence adduced by the libelant (Petitioner herein). These facts are summarized in the opinion of the Circuit Court of Appeals.

We respectfully submit that, on these facts and for the reasons outlined in the foregoing brief, the application for a writ of certiorari should be denied.

Dated, New York, N. Y., August 28, 1937.

ANTHONY V. LYNCH, JR.,
CHARLES W. HAGEN,
HORACE T. ATKINS,
Proctors for Respondent, Fernando de los Rios, Spanish Ambassador to the United States of America.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, appellant,

Respondent in this Court.

BRIEF FOR RESPONDENT.

CHARLES W. HAGEN,
HORACE T. ATKINS,
JESSE L. ROSENBERG,
JOHN S. BULL,
Counsel for Respondent.

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Supreme Court of the United States

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COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
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Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

Opinions Below.

The official reports of the Opinions rendered by the Courts below are as follows:

(1) *The Navemar,* 17 Fed. Supp. 647

(Denial of first application of Ambassador to intervene.)

(2) *The Navemar,* 17 Fed. Supp. 495

(Motion to punish crew for contempt of Court for refusal to leave the "Navemar".)

(3) *The Navemar,* 18 Fed. Supp. 153

(Denial of second application of Ambassador to intervene.)

(4) *The Navemar,* 90 Fed. (2d) 673

(Opinion of the Circuit Court of Appeals for the Second Circuit reversing order of the District Court on second application of Ambassador to intervene.)

Statement of the Case.

No complete statement of facts is contained in petitioner's brief and in order to supply this omission and to correct certain inaccuracies in petitioner's review of the proceedings in the Courts below, we submit herewith the following summary of the facts of this case which are material to the issues.

Statement of Facts.

On September 11, 1936, the Spanish Steamship "Navemar" sailed from New York. After stopping at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo she arrived at Buenos Aires on October 9, 1936 (R. 169).

On the 10th day of October, 1936, while the "Navemar" was in Argentina the President of the Republic of Spain issued a decree to the effect that the Republic of Spain expropriated the steamship "Navemar" owned by Compania Espanola de Navegacion Maritima, S. A. for use of the national public service, which decree provided, among other things, that the "Navemar" be managed by the Minister of Communications and Merchant Marine through the General Bu-

reau of Merchant Marine. In said decree it was provided that the decree would become the law of the Government of Spain on publication of the decree in the Gaceta de Madrid. The publication took place on October 11, 1936. The decree provided that the fact of the attachment and "the consequent change of authority" should be noted on the documents of the vessel (R. 119).

At Buenos Aires on October 16, 1936, the master of the "Navemar" received a cablegram from the Director of Navigation of the Republic of Spain informing him of the confiscation of the "Navemar" (R. 15). On receipt of the cablegram, Martinez, the master of the "Navemar", presented himself to the Spanish Consul in accordance with the instructions received from the Director of the Spanish Merchant Marine (R. 16). For the purpose of receiving additional cargo the "Navemar" proceeded from Buenos Aires to Rosario. The master of the "Navemar", Martinez, testified as follows:

> "I proceeded to Rosario. I wrote a letter back to Buenos Aires putting myself again at the disposal of the Spanish Consul General, and proceeded to Rosario, since he gave me no other instructions" (R. 17).

At Rosario he loaded additional cargo consigned to the charterers, Linea Sud Americana, and deposited the ship's roll with the Consul (R. 17). The "Navemar" then left Rosario on advices of the Maritime Commission because of impending low water (R. 17). At the time of departure the Consul's office was closed and the ship departed without her roll and returned to Buenos Aires for additional cargo (R. 18). The mas-

ter then again reported to the Consul General at Buenos Aires and requested him to arrange to have the ship's roll sent by the Consul at Rosario to the ship's agents at Buenos Aires. The Consul at Rosario did not comply with this request, but instead forwarded the ship's roll to the Consul General at Buenos Aires (R. 18).

The Consul General at Buenos Aires thereupon delivered the ship's roll, together with the ship's register (which during all this time had been in the possession of the Consul General at Buenos Aires), to the master of the "Navemar" (R. 19). At the time of the delivery of these documents the attention of the master of the "Navemar" was called to an endorsement which had been made on each of these documents by the respective Consuls. On the ship's roll the Consul at Rosario made an endorsement, over his signature and official seal, which, translated, reads as follows:

> "Through a cable dated 26 of the instant month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936" (R. 123).

On the ship's register the Consul General at Buenos Aires made an endorsement, which translated from the Spanish reads as follows:

> "By cable dated the 15th of October of 1936 to the Spanish Embassy at this capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazette on the date of the 11th of the present month" (R. 23, 123).

As the Consul General at Buenos Aires had not as yet received specific instructions regarding the "Nave-

mar" from the Director of the Merchant Marine at Madrid, he authorized the master to continue his voyage to New York (R. 23). The master of the "Navemar" thereupon cabled the Director of the Spanish Merchant Marine confirming these instructions. The cablegram, translated, reads as follows:

> "General Director of Merchant Marine,
> Madrid
>
> Authorized by Consul General we sail for New York Greetings
>
> Signed MASTER 'NAVEMAR'"

(R. 141).

On October 28, 1936, the "Navemar" sailed from Buenos Aires and on arrival at New York deposited her documents with the Collector of Customs at the Port of New York (R. 142). Among these documents was the ship's register on which appeared the endorsement to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar" (Exhibit 23), which were also deposited with the Collector of Customs of the United States, contained the notation that the "Navemar" was "owned as set forth in the register" (pp. 236, 237, 238).* Hence, when the ship entered the Port of New York her documents showed that she was the property of the Republic of Spain.

After arrival at New York the master of the "Navemar" recognized and represented that he was operating the ship for the Republic of Spain even as late as December 7, 1936 (the date on which the libel was filed), when he wrote to the charterers of the ship, Linea Sud Americana, as follows:

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* These references are to original record, the manifests not having been reproduced in the reprint of the record.

"On October 28, 1936, possession of the SS 'Navemar' was taken by the Spanish Government and the ship was confiscated by decree of October 10 published in the official Gaceta October 11 according to orders which I received at Buenos Aires on October 16, 1936 from the Director General of the Merchant Marine at Madrid.

Since October 28th I have been generally under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires.

Since October 28th. I have been operating under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires. While I was in Buenos Aires, on October 28th., I was shown the original of a letter, dated October 26th., addressed to Messrs. Garcia & Diaz, Ltda., S. A. de Representaciones Maritimas, Sarmientos 329, by the Spanish Consul there, reading as follows:

'Please be informed by this letter that as per information received from Madrid, through the Spanish Embassy in this Capital, the steamer consigned to you of the Compania Espanola de Navegacion Maritima, S. A. "Navemar" has been confiscated by the Government of the Spanish Republic; and the Captain of said vessel should follow the instructions that officially he may receive from the corresponding Department.

Which I communicated to you for your knowledge and respective effects.

Yours very truly,

The Spanish Consul in
charge of the Consulate General
AMADOR SANCHEZ'

While at Rosario I presented myself to the Spanish Consul there and he noted on the ship's articles on October 26th, the fact that the ship was now the property of the Spanish Government. Later on October 28th, when I was at Buenos Aires a similar notation was made on the ship's official register by the Spanish Consul there.

I attach photostats of the ship's articles and the ship's register showing these notations. Since arriving at New York I have presented myself to the Spanish Consul here and he has given me orders that the steamship 'Navemar' *is still to be held at the disposal of the Spanish Government.* With this letter I hand you a copy of the official letter which I have received from the Spanish Consul at New York" (Libelant's Exhibit 7; R. 26).

Prior to the writing of this letter, Martinez, master of the "Navemar", so far recognized the fact that he was acting for the Republic of Spain that he went to Luis Careaga, acting Consul General at New York, and received from him funds to cover wages and advances made by the master for account of the crew. On receipt of the money he signed the following document:

"Received from the Honorable Consul General of Spain in New York the amount of $300. as an advance to attend to the expenses of the vessel of my command.

New York, December 2, 1936.

MANUEL MARTINEZ
Master of the Steamer 'Navemar'."

(R. 152).

Proceedings in the Courts Below.

On or about December 3, 1936, a dispute arose between the master of the "Navemar" and the committee* of the crew. After this dispute had arisen the master of the "Navemar", together with two members of the duly elected committee, proceeded to the office of the Consul General of Spain and submitted the dispute to the Spanish Consul in accordance with Article XXIII of the Treaty of Friendship and General Relations between Spain and the United States, 33 Statutes at Large (Part 2) 2105 (Appendix A).

The Consul General of Spain had exclusive authority to investigate and determine this dispute between the master and crew of the "Navemar". No provision is made either in the treaty or in the laws of the United States for an appeal to or review of his decision by any of the courts of the United States.

The Consul General of Spain, after hearing both sides of the dispute, concluded that the actions of the committee of the crew were proper and hence entitled to his approval.

Shortly thereafter the master of the "Navemar", Martinez, was relieved of command of his vessel and another master, Tomas Pascual, was appointed by the Consul to take command of the "Navemar" (R. 124).

Despite this determination of the dispute between the master and crew by the Consul, petitioner insti-

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* Under the laws of the Republic of Spain (R. 71, 72) committees of the crew are authorized to deal with the master in respect to certain specified details relating to the operation of a Spanish vessel. The five named respondents constituted such a committee on the S. S. "Navemar".

tuted an action in the United States District Court seeking to overrule the decision of the Consul General and to take the vessel from the Republic of Spain (Libel R. 4, 5).

Process was issued *in rem* against the steamship and against five named members of the crew for the purpose of quelling disorder on board a foreign ship, a procedure authorized neither by law nor treaty.

The process was made returnable on December 9th, two days after the libel was filed, and hearings were held forthwith by the District Court.

A final decree granting possession of the vessel to the libellant was thereupon entered, and although the libel had been brought against only five members of the crew, the process of the Court was used to remove the entire ship's personnel (see Appendix C).

In the meantime the Ambassador, Fernando de los Rios, had made representations to the Secretary of State of the United States. The Secretary of State replied that it was not the policy of this government to intervene in such matters (R. 255), whereupon the Ambassador authorized Jesse L. Rosenberg to act as attorney for him in the Courts of the United States (R. 253). The Ambassador twice sought unsuccessfully to intervene as claimant of the "Navemar", and then appealed to the Circuit Court of Appeals.

In due course the appeal was argued and the order of the District Court denying the second application of the Ambassador to intervene was reversed by the Circuit Court with directions to the District Court to enter an order dismissing the libel for lack of jurisdiction.

Summary of Argument.

The following is a brief summary of the argument submitted on behalf of Fernando de los Rios, Ambassador of the Republic of Spain, respondent in this Court:

(1) The several appearances of the Acting Consul General in open court were in accordance with the provisions of the Treaty between Spain and the United States, and of Section 256 of the Foreign Relations Law; the subsequent application of the Ambassador to become a party to the litigation and thus raise the jurisdictional question followed the procedure outlined by this Court in *Ex Parte Muir,* 254 U. S. 522.

(2) On principles of international comity, the statement of the Ambassador as to the right of the Republic of Spain to possession of the "Navemar", a Spanish vessel which, at the time of requisition by the Republic of Spain, was owned by a Spanish corporation, should be accepted as conclusive by the courts of the United States.

(3) If, as stated by petitioner, this suit was instituted because of the unlawful action of five members of the crew of the "Navemar", all of whom were Spanish citizens, the courts of the United States had no jurisdiction because of the provisions of the Treaty; if, on the other hand, this is a possessory suit in which a Spanish corporation is endeavoring to question the right of the Government of Spain to possession of the "Navemar", the matter is not justiciable, and the Circuit Court properly declined to take jurisdiction, since a sovereign is not subject to the process of the Court.

(4) That the steamship "Navemar" was actually in the possession of the Republic of Spain at the time of her arrival in the United States is conclusively established not only by the Ambassador's representations, but also by the proofs offered by the libelant in the District Court before the entry of the default decree.

(5) The steamship "Navemar" having been in the actual possession of the Republic of Spain at the time of her arrival in the United States, the proceedings now before the Court cannot be interpreted as an attempt on the part of the Republic of Spain to enforce a decree of confiscation within the territorial limits of the United States.

(6) The United States Circuit Court of Appeals, having reversed the order of the District Court denying the application of the Ambassador to intervene, properly directed the District Court to vacate the decree and dismiss the libel.

POINT I.

The several appearances of the Acting Consul General in open court were in accordance with the provisions of the Treaty between Spain and the United States, and of Section 256 of the Foreign Relations Law; the subsequent application of the Ambassador to become a party to the litigation and thus raise the jurisdictional question followed the procedure outlined by this Court in *Ex Parte Muir*, 254 U. S. 522.

A.

At page 18 of the brief filed on behalf of the petitioner it is argued that Acting Consul General Careaga was without authority to make any representations whatever on behalf of the Republic of Spain and that the Court should have disregarded his application.

Article XXI of the Treaty of Friendship and General Relations between the United States of America and Spain, U. S. Statutes at Large, 33 Stat. (Part 2) 2105, provides as follows:

> "The Consuls-General, Consuls, Vice-Consuls and Consular Agents of the two High Contracting Parties, shall have the right to address the authorities of the respective countries, national or local, judicial or executive, within the extent of their respective consular districts, for the purpose of complaining of any infraction of the treaties or conventions existing between the two countries, or for purposes of information, or for the protection of the rights and interest of their countrymen, whom, if absent, such consular officers shall be presumed to represent.

> If such application shall not receive proper attention, such consular officers may, in the absence of the diplomatic agent of their country, apply directly to the Government of the country to which they are commissioned."

We submit that the Consul General's appearance before the Court was strictly in accordance with the foregoing provisions of the Treaty between Spain and the United States.

The libel was filed on December 7, 1936, and process was returnable on December 9th. On that day Acting Consul General Careaga appeared by counsel before the United States District Court and objected to the jurisdiction of the Court. On December 11, 1936, Careaga appeared in person before the Court, and offered to explain the situation to the District Judge. His offer was refused (R. 34). On December 14, 1936, at the conclusion of the libelant's testimony, Careaga, appearing by Mr. Rosenberg, his attorney, addressed the Court as follows (R. 80):

> "The Court: In view of the default and failure to file an answer——
>
> Mr. Rosenberg: Your Honor,——
>
> The Court: *Pardon me, you have no standing here.* And the libellant having established a *prima facie* cause sustaining all the material allegations of the libel, a decree in conformity with the prayer will be granted, and the libellant is directed also to file findings of fact and conclusions of law.
>
> Mr. Ryan: Yes, sir.
>
> Mr. Rosenberg: Your Honor,——
>
> The Court: *You have no standing.*
>
> Mr. Rosenberg: May I make a remark?
>
> The Court: *You may not"* (fols. 341, 342).

Since the libel as stated by petitioner at page 21 of its brief, related to a dispute between the master and crew of a Spanish vessel, the Courts of the United States were forbidden by Article XXIII of the Treaty to interfere in said dispute on any pretext whatever. (Article 23 of the Treaty is printed as an appendix to this brief.)

Since the provisions of Article XXIII of the Treaty were being violated, the Acting Consul General had the right under Article XXI of the Treaty to address the Court directly.

In *The Belgenland,* 114 U. S. 355, 365, this Court said:

> "Of course, if any treaty stipulations exist between the United States and the Country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. *The Elwin Kreplin,* 9 Blatchford 438, reversing S. C. 4 Ben. 413; See S. C. on application for mandamus, *Ex Parte Newman,* 14 Wall. 152."

Subsequently the Consul General again addressed the Court, this time by motion in the Circuit Court of Appeals requesting leave to appeal to that Court and there call attention to the violation of the Treaty. This application was denied by the Circuit Court of Appeals (R. 225).

We respectfully submit that Acting Consul General Careaga had properly availed himself of the right granted by Treaty to address the Court for the purpose of complaining of an infraction of the Treaty.

B.

Since the District Court had failed to pay due respect to the wishes of the Consul in regard to taking jurisdiction of this controversy, the Ambassador directed a diplomatic note to the Secretary of State of the United States and received the following reply:

"Excellency:

Reference is made to your note of December 10, 1936, regarding a case pending in the United States District Court for the Eastern District of New York concerning the right to possession and ownership of the foreign steamship 'Navemar', in which you request that representations be made by the Attorney General of this Government in behalf of your Government.

In reply you are informed that it is the practice of this Department in cases such as the one presented in your note to refrain from taking any action which might constitute an interference by the executive authorities of this Government with regard to the merits of the controversy. As your Embassy was orally advised this morning, your Government has the right to appear directly before the court in a case of this character" (R. 254).

The Ambassador thereupon authorized Jesse L. Rosenberg to act as attorney. The telegram of authorization reads as follows:

"I hereby authorize you to represent me before the United States District Court, New York City, in the case of *S. S. Navemar,* which is the property of the Spanish Government.

Sgd. FERNANDO DE LOS RIOS
Spanish Ambassador"

(R. 253).

The Ambassador also granted a power of attorney to Luis Careaga, the Acting Consul General, authorizing him to represent the Ambassador and to perform all necessary ministerial acts in order to perfect the appearance of the Ambassador as a party claimant in this litigation (R. 257).

In *The Pesaro,* 255 U. S. 216, and in *Ex parte Muir,* 254 U. S. 522, this Court pointed out three permissible and adequate forms of procedure by which the question of jurisdiction could be raised. They are as follows:

1. If the foreign Sovereign deems it inadvisable to appear in the courts of the United States, a diplomatic representation can be made to the Department of State to the end that the Attorney General will file a suggestion of immunity.

2. The Sovereign itself as of right is entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question.

3. The accredited and recognized representative of the foreign Sovereign may appear and take the same steps in the foreign Sovereign's interests.

The Ambassador having considered the matter diplomatic rather than judicial, had addressed a note to the Secretary of State and in due course had received the reply quoted above. Having been advised by the Secretary of State of the United States that he had the right to appear directly before the Court, the Ambassador sought to appear as claimant of the "Navemar".

The first application of the Ambassador was made by order to show cause dated December 16, 1936, which order was supported by an affidavit of Luis Careaga. It is in the form of a suggestion by Fernando de los Rios, Ambassador of the Republic of Spain, and prays that the default decree be vacated, that the "Navemar" be returned to the custody of Luis Careaga for and on behalf of the Republic of Spain and that the prosecution of all actions against the ship be restrained (R. 100). This application was denied by the District Court by order dated January 4, 1937, which order provided, among other things that "permission be granted to the said Fernando de los Rios, Ambassador of the Republic of Spain, to present another application for leave to appear" (R. 118).

A second application was thereupon made by order to show cause dated January 8, 1937 (R. 118). One of the supporting affidavits on this application of the Ambassador was also signed by Luis Careaga. In this application the Ambassador prays that the default be opened and that Fernando de los Rios, Ambassador of the Republic of Spain, without waiving any favors, privileges, immunities and exemptions to which he is entitled as said Ambassador, be permitted "to appear as claimant" of the steamship "Navemar" (R. 119). Only this second application is now before this Court.

We submit that there has been no delegation of diplomatic functions by the Ambassador, as argued by Petitioner. Careaga merely verified the petition, as he had a right to do under the Ambassador's power of attorney and under Admiralty Rule 12 of the District Court for the Eastern District of New York (Appendix B). This rule further provides that if the personal oath of a non-resident party is demanded, a

motion may be made for a stay pending the procurement of such verification. No such motion was made by libelant in the District Court.

As the Circuit Court of Appeals has pointed out, "the Ambassador had followed a permissible and adequate procedure, distinguished from that which was held insufficient in *United States* v. *Pesaro* (255 U. S. 216) and *Ex parte Muir* (254 U. S. 522)" (R. 229).

POINT II.

On principles of international comity, the statements of the Ambassador as to the right of the Republic of Spain to possession of the "Navemar", a Spanish vessel which, at the time of requisition by the Republic of Spain, was owned by a Spanish corporation should be accepted as conclusive by the courts of the United States.

In *Ex parte Muir, supra,* and in *The Pesaro, supra,* this Court disapproved the practice of accepting a suggestion by an Ambassador presented by private counsel appearing as *amicus curiae,* which practice had been recognized by the lower courts in many earlier cases, and stated that a proper procedure to be followed in such cases was for the Ambassador to propound his claim to the vessel in the attitude of a suitor and to thus raise the jurisdictional question. In other words, these cases related only to procedure, and in no way affected the well settled principle that in a suit in a foreign court in which a sovereign is a party, the statement of the Ambassador as to the law of his country cannot be challenged by judicial inquiry.

In the present case the Ambassador of Spain had sought to file his claim and to raise the jurisdictional

question. Counsel for petitioner argue, however, that the Ambassador's statements as to the law of Spain and as to the fact of expropriation of the "Navemar" are subject to judicial inquiry and that the Ambassador must submit himself to the jurisdiction of the Court and offer proof of his allegations. The Circuit Court of Appeals, on the other hand, has found that the allegations of the Ambassador as to possession and ownership of the "Navemar" by the Republic of Spain must be taken as conclusive (R. 231).

In this connection we call attention to the opinion, in *Martiarena* v. *Amaliobeta and Urutia,* printed as Appendix B of Petitioner's brief, where this same principle was recognized by the Civil Court of Antwerp:

> "Whereas, therefore, if it is asserted that an official declaration of a foreign Minister must be taken as the truth, this applies however only in as far as this declaration relates to an action in which the foreign state is itself concerned, either direct, or indirectly, *quod non;*"

An able discussion of the immunity of an Ambassador from such judicial inquiry is contained in the opinion of Rellstab, *J.,* in *The Roseric,* 254 Fed. 154. At page 162 the Court said:

> "Libelant further contends that the suggestion of the British government is not conclusive, and, if so intended, is not properly before the court, because not presented by the United States attorney. As to the conclusiveness of the suggestion: In *The Exchange, supra,* the libelant answered the suggestion interposed on behalf of the French government and sought to put it in issue. The Supreme Court, however, accepted the facts

as declared in the suggestion. In *The Parlement Belge, supra,* the court, to a like contention, by Brett, *L. J.,* said:

> 'The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange.* Whether the ship is a public ship, used for national purposes, seems to come within the same rule.' "

In *The Adriatic,* 258 Fed. 902, 904 (C. C. A. 3), the Court said:

> "On principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusively establishing both the fact of the requisition and its governmental character. Such has been the practice, as to similar facts, of the English courts (*The Parlement Belge,* L. R. 5 P. D. 197; *The Constitution,* L. R. 4 P. D. 39), and quite generally of the courts of this country. See *The Maipo* (D. C. S. D. N. Y.), 252 Fed. 627; *Agency of Can. Car & F. Co.* v. *American Can Co.* (D. C. S. D. N. Y.), 253 Fed. 152; *The Roseric* (D. C. N. J.), 254 Fed. 154, where the suggestions were made directly by counsel for an embassy, and *The Exchange,* 7 Cranch 116, 3 L. ed. 287, where it was

made through the attorney for the United States."

In *The Maipo,* 252 Fed. 627, 628, Judge Mayer stated:

> "The suggestion is not open to question and must be accepted as made * * *. It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government."

To like effect, where a suggestion was made by the Italian Ambassdor, in *The Carlo Poma,* 259 Fed. 369, 370, Judge Ward stated:

> "That the suggestion was sufficient proof of the statements contained in it is not seriously contested. We accept it as verity."

The doctrine of immunity of the duly accredited representative and of other instrumentalities of a foreign sovereign in the courts of another sovereign

> "is based upon the idea that sovereigns are of equal dignity and independence, and that out of regard for such rights, and to maintain and further amicable relations among them, it is, by tacit agreement, recognized as needful, in certain particulars, that one sovereign should decline to exercise some of its prerogatives where to exercise them would necessarily place another sovereign in a subordinate position." *The Roseric,* 254 Fed. 154, 161."

These fundamental principles of comity and international law were recognized by the Circuit Court of Appeals when in its opinion it said (R. 231):

> "The claim of this public control is borne out by the Ambassador's suggestion and his desire to

intervene. The allegations of the suggestion we are bound to accept as conclusive. * * * It is not for us to examine the propriety or to determine the validity of the decree affecting property within the foreign sovereign's dominion. If by any misadventure the authorized representative of a foreign state should make an unfounded suggestion, the proper remedy would be through diplomatic channels between the two sovereigns and not by legal proceedings against an independent sovereign or its property."

POINT III.

If as stated by petitioner this suit was instituted because of the unlawful action of five members of the crew of the "Navemar" all of whom were Spanish citizens, the courts of the United States had no jurisdiction because of the provisions of the Treaty; if, on the other hand, this is a possessory suit in which a Spanish corporation is endeavoring to question the right of the Government of Spain to possession of the "Navemar", the matter is not justiciable, and the Circuit Court properly declined to take jurisdiction since a sovereign is not subject to the process of the Court.

Petitioner at page 21 of its brief calls the Court's attention "to the fact that the circumstance which led to the institution of this suit was the unlawful action of five members of the crew who interfered with the orderly operations of the 'Navemar' while she was lying at anchor in New York harbor, in preventing a repair gang from Robins Drydock from making necessary repairs (R. 171), which the master had ordered on the petitioner's instructions (R. 171)". We cannot concede that the action of these men was unlawful, since it had been approved by the Consul;

but assuming this statement to be otherwise correct, then by virtue of the provisions of Article XXIII of the Treaty (Appendix A) the Courts of the United States were forbidden "on any pretext whatever" to take jurisdiction, and the Consul properly availed himself of the right guaranteed by Article XXI of the Treaty to appear in person before the Court and protest against this violation of the Treaty rights of the Republic of Spain.

Moreover in all reported cases which relate to a dispute involving only citizens of a foreign sovereign and a vessel of that sovereign, it has invariably been held, for the reasons stated by this Court in *The Belgenland,* 114 U. S. 355, 364, that "on general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is a special reason for doing so, and will require the foreign consul to be notified, and though not absolutely bound by, will always pay due respect to his wishes as to taking jurisdiction".

But the Circuit Court of Appeals looking beyond the ostensible purpose of the suit said:

> "Jurisdiction to entertain this suit is challenged because (1) by virtue of Art. XXIII, of the Treaty between Spain and the United States matters relating to the 'internal order of merchant vessels' and to 'differences which may arise either at sea or in port between captains, officers and crews' are placed within the cognizance of the Consuls of the respective nations; and (2) that the 'Navemar' being a public vessel of the Spanish Government is immune from judicial process. The first ground may be dismissed with the observation that the issue in this case is one of title or ownership to the 'Navemar' and not the mere

settlement or adjustment of internal differences on the vessel" (R. 230).

In this view of the case, the decision of the Circuit Court of Appeals in refusing to entertain jurisdiction is entirely correct. The libel in the present case was *in rem* and, as pointed out by the Circuit Court of Appeals, "an action against a foreign vessel is not only *in rem,* but also *in personam* against the foreign sovereign. *The Parlement Belge,* 5 P. D. 197". Since the Republic of Spain, through its duly accredited representative, has itself asserted claim to the vessel, the controversy in its very nature is not justiciable in the Courts of this country.

The Exchange, 11 U. S. 116;
Texas Co. v. *Hogarth,* 256 U. S. 619;
Berizzi v. *Pesaro,* 271 U. S. 562;
The Maipo, 259 Fed. 367.

If the sole issue is one of title and ownership and the case is to be regarded as a possessory suit designed to question the right of the Government of Spain to possession of the "Navemar", then the principles of *The Exchange,* 11 U. S. 116, are applicable. The distinction between possessory suits and suits which arise out of a wrong committed by the vessel itself (such as cases of cargo damage, collision, etc.) has been clearly brought out by this Court in that case and subsequent cases. In *The Exchange,* the District Court had dismissed the libel on the ground that a public vessel of a foreign sovereign is not subject to the ordinary judicial tribunals of this country "so far as regards the question of title". The Circuit Court of Appeals reversed the decree of the District Court, but this Court directed that the

decree of the District Court dismissing the libel be reinstated.

Although *The Exchange* concerned a public armed vessel of a foreign sovereign and the instant case involves a merchant ship, it is submitted that the principles laid down by this Court in *The Exchange* would have been in no wise different if the vessel had been engaged in the merchant service instead of in the naval service of the foreign sovereign.

Berizzi v. *Pesaro,* 271 U. S. 562;
The Maipo, 259 Fed. 367.

This distinction between a possessory action and an action arising out of a wrong committed by the ship itself which was first suggested by the words "so far as regards the question of title" in *The Exchange, supra,* is clearly asserted in *The Belgenland,* 114 U. S. 355, where this Court said, at page 365:

> "So in a question of ownership of a foreign vessel, agitated between subjects of the nation to which the vessel belonged, the English Admiralty, upon objection being made to its jurisdiction, refused to interfere, the consul of such foreign nation having declined to give his consent to the proceedings."

In England it is well settled that the admiralty courts will not take jurisdiction of such possessory actions involving foreign vessels unless by consent of the parties or by request of the representatives of the foreign sovereign.

The Evangelistria, 2 P. D. 241;
The Agincourt, 2 P. D. 239;
The See Reuter, 1 Dodds. 22.

Petitioner is endeavoring to apply the principles applicable to cargo and collision cases, to a possessory suit between a foreign corporation and the Sovereign to which that corporation owes its very existence (Pet. Brief, pp. 27, 28).

In cases of cargo and collision damage there is, of course, every reason for requiring proof of the fact that the vessel owned or operated by the foreign sovereign was actually engaged in the public service at the time of the commission of the wrong. In such cases, the Courts have consistently held that the vessel can be immune from process only upon a showing of use by the sovereign itself at the time the wrong was committed.

The Davis, 77 U. S. 15;
The Johnson Lighterage Co., 231 Fed. 365;
The Attualita, 238 Fed. 909;
The Maipo, 259 Fed. 367;
The Carlo Poma, 259 Fed. 369;
Berizzi v. *Pesaro,* 271 U. S. 562.

In discussing the question of immunity of the property of a sovereign in a cargo case Judge Ward in *The Carlo Poma, supra,* said:

> "The English courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge,* Law Reports, 5 P. D. 197; *The Jassy* (1906), P. 270.
>
> The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign

of the property at the time process is served. *The Davis,* 10 Wall. 15, 19 L. Ed. 875; *Long* v. *The Tampico* (D. C.), 16 Fed. 491; *The Attualita,* 238 Fed. 909, 152 C. C. A. 43."

The stated theory underlying the rule applied by the Courts of this country, is that, if the ship is not in the possession or service of the Sovereign, the mere issuing of process against the vessel which is being operated by someone other than the Sovereign, in no way affects the rights of the Sovereign.

But these principles are not applicable to a possessory suit in which one party is the Sovereign and the other a corporation which owes its existence to that Sovereign, for the reason that the question is not justiciable not only because the foreign law is immune from attack judicially but for the greater reason that the sovereign himself is immune.

Ex parte State of New York, 256 U. S. 490.

However, even if the principles relating to cargo and collision cases were here applied, we submit that it has been conclusively established that the "Navemar" was in the possession and the service of the Republic of Spain and hence immune from process. Such in fact has been the decision in every case cited by petitioner in which, as here, there was a representation by the Ambassador of possession and employment by the sovereign.

POINT IV.

That the steamship "Navemar" was actually in the possession of the Republic of Spain at the time of her arrival in the United States, is conclusively established not only by the Ambassador's representations, but also by the proofs offered by the libelant in the District Court before the entry of the default decree.

The statements of the Ambassador of the Republic of Spain as to the law of his country in a case in which his Sovereign is a party cannot be controverted in the courts of the United States. The material allegations of the suggestion are as follows (R. 120-126):

1. That the Republic of Spain is a sovereign nation.

2. That by Treaty the Ambassador of the Republic of Spain is granted full favors, privileges, immunities and exemptions.

3. That the "Navemar" is a Spanish vessel under the flag of Spain.

4. That by the law of the Government of Spain the steamship "Navemar" was attached by the Spanish State and is a vessel in the service of the Spanish State for its national public service.

5. That when the "Navemar" was libeled in New York, she was being held by the Spanish Government for the purpose of carrying cargo from New York to Spain.

6. That at all times mentioned in the libel the steamship "Navemar" was in the possession of the Republic of Spain and subject to its direction and

control for use in its national public service as distinguished from any possession, direction, control or use of any individual citizen of the Republic of Spain, private or official.

7. That the Republic of Spain has not consented to being sued in the Courts of the United States.

8. That the said steamship under the laws of Spain was under the absolute control of the Republic of Spain.

However, apart from the allegations of the suggestion, it has been established by the libelant's own testimony that the vessel was in fact in the actual possession of the Republic of Spain at the time she arrived in New York and during all times thereafter until her crew were removed from the vessel under process of the District Court issued under this libel. The facts proved by libelant have been found by the Circuit Court of Appeals to be as follows (R. 232):

1. That the register and roll of the "Navemar" each contained an endorsement which indicated that under Spanish law the steamship "Navemar" became the property of the Spanish Government by decree of confiscation published on the 11th of October, 1936.

2. That the master of the "Navemar" at Buenos Aires, recognizing the authority of the Spanish Government, placed himself at the disposal of the Spanish Consul at Buenos Aires pursuant to direct instructions by the Spanish Government.

3. That the master on December 7, 1936, advised the former owners of the vessel that on October 28, 1936, the Spanish Government had in fact obtained possession of the "Navemar", and that since that

date the said master had been generally under orders of the Spanish Government.

4. That on arrival in New York the master received from the Spanish Consul at New York the sum of $300 to attend to the expenses of the vessel (Note).

Furthermore, on arrival at New York the master of the "Navemar" deposited the usual ship's documents with the Collector of Customs at the Port of New York. Among these documents was the ship's register, on which appeared the endorsement over the signature and seal of the Spanish Consul at Buenos Aires to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar", which had also been deposited with the Collector of Customs of the United States contained the notation that the ship was "owned as set forth in the register" (pp. 4, 5, *supra*).

It follows, therefore, that it has been conclusively established that as between the libelant, a Spanish corporation, and the Republic of Spain the latter was actually in possession of the "Navemar" at the time she arrived in New York.

It has been argued by the petitioner that constructive possession by a foreign government of a vessel is not sufficient to render her immune from suits in the courts of the United States. A complete answer to that argument, if the argument were in fact applicable to a possessory suit, is that the possession of the Republic of Spain was actual and not constructive.

Note—At page 30 of its brief, Petitioner discusses the payment of wages by the libellant. We deem this discussion irrelevant to the issues here presented, but for the information of the Court we have prepared a review of the facts attending this payment which is printed as Appendix C of this Brief.

In *The Roseric,* 254 Fed. 154, 160 (D. C. N. J.), the Court, after discussing the effect of the presence of the owner's crew on a vessel after requisition by the British Government, said:

> "The contention of libelant that, as the ship's officers and crew operated the 'Roseric', she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the 'Roseric' and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.
>
> * * * Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.
>
> The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.
>
> In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy."

So, too, in Hyde, International Law, Volume I, page 445:

> "In such case the dedication of the ship to public service would seem to render the constructive possession of the sovereign as efficacious for purposes of exemption as actual possession mani-

fested by the assertion of control through the medium of its own officers."

See also:

The Adriatic, 258 Fed. 902 (C. C. A. 3).

The statement by petitioner that the decision of the Circuit Court of Appeals in respect to possession is in conflict with the decision of this Court in *The Davis*, 77 U. S. 15, is incorrect and the incomplete quotation from that decision is misleading. We shall quote from *The Davis*, at page 21, and shall italicize so much of the quotation as has been omitted in the petitioner's brief.

> "But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the Court? The possession which would do this must be actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. *We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process.*"

We submit that under the allegations of the suggestion of the duly accredited representative of the Republic of Spain, and on the proofs established by libelant, there was such a possession vested in the Government of Spain that to change or divest it under process of the court, would be to bring the officer of the court into collision with the officer of the government, since the latter has, in this case, chosen to resist.

POINT V.

The steamship "Navemar" having been in the actual possession of the Republic of Spain at the time of her arrival in the United States, the proceedings now before the Court cannot be interpreted as an attempt on the part of the Republic of Spain to enforce a decree of confiscation within the territorial limits of the United States.

The "Navemar" is a Spanish vessel; the libelant is a Spanish corporation, all of whose stockholders are Spanish citizens; the members of the crew are all Spanish citizens; the Ambassador of Spain states that under Spanish law the ship is the property of the Republic of Spain.

In *United States* v. *Belmont,* 301 U. S. 324, this Court said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows only the rights of the Russian corporation

> have been affected by what has been done and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding it shall be made to appear that they are so affected as to entitle them to judicial relief."

The duly authenticated documents of the vessel indicated that when she arrived here she was the property of the Republic of Spain.

In the *Santissima Trinidad,* 20 U. S. 283, 334, Mr. Justice Story said:

> "In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not required to be produced. Nor will the courts of a foreign country inquire into the means by which the Title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission therefore of a public ship when duly authorized, so far, at least, as foreign courts are concerned, imparts absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been settled practice between nations; and, as a rule founded in public convenience and policy, cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

The labored argument of counsel for petitioner in an attempt to make it appear that the Government

of Spain is in this proceeding endeavoring to enforce a decree of confiscation within the territorial limits of the United States finds no support in the record. On the contrary, in the libel, verified by petitioner, it is alleged that the crew took possession of the "Navemar" in October, 1936 (R. 4), before the vessel arrived in the United States. As the Circuit Court of Appeals said, they were acting under the compulsion of the Sovereign and the lawfulness of their acts is borne out by the desire of the Ambassador to intervene and file claim to the "Navemar".

Petitioner contends (Petitioner's Brief, pp. 21-27) that the mere fact of the filing of a libel and issuing of process under that libel by Robins Drydock & Repair Company against the "Navemar" *in rem,* somehow affects the right to continued possession of the "Navemar" by the Republic of Spain and the immunity of the Spanish Ambassador. The libel of the Robins Drydock & Repair Company against the "Navemar" was brought to recover the amount of a bill for repairs which had been incurred on the order of Linea Sud Americana, charterer of the "Navemar", on a previous voyage before the vessel had been requisitioned by the Republic of Spain. The libel was filed on December 4, 1936 and process was returnable on December 16, 1936, this being the usual period within which process is returnable in the United States District Court.

The libel in this possessory suit was filed on December 7, 1936, and by special order of the District Court, procured by petitioner's proctors, process was made returnable, not within the usual time limit, but on December 9, 1936, less than 48 hours after the libel had been filed and process issued. Having now before us petitioner's present argument, the reason for the undue insistence by counsel for petitioner for an

immediate hearing by the District Court (R. 8-14) and for the disregard of the request of the duly accredited representative of a friendly foreign state for a reasonable time within which to communicate with the Ambassador and make necessary diplomatic representations, become clearly apparent. The testimony of the libelant was taken summarily. At the close of the hearing, the Court directed the submission of findings of fact in accordance with Rule 56½ of this Court. Without complying with the provisions of Rule 56½ or with the request of the District Court for findings of fact, proctors for petitioner herein immediately submitted a final decree to the Court which was signed by the Court on the same day, December 14, 1936. Since this decree entered on December 14, 1936 provided that the petitioner (libelant below) was alone entitled to possession of the "Navemar" as against the world, any attempt by the Ambassador or by any person other than the libelant to file claim to the "Navemar" in the Robins Drydock suit (which was not returnable until two days later, December 16th), would at least have been discourtesy to the Court if not actual contempt of Court.

Counsel for petitioner well know that the Circuit Court of Appeals had before it all of these facts and, being fully apprised of the situation, has effectively restrained further proceedings in the Robins' libel and has granted to the Ambassador leave to intervene in that suit and in others now pending against the "Navemar" (R. 211). That the Ambassador has chosen to take no further action in these other cases until after a final determination of the present possessory suit, can in no way affect his right to possession of the "Navemar" against the claim of petitioner.

Petitioner's argument overlooks the fact that the decree of expropriation became the law of Spain on

October 11, 1936, long before the "Navemar" arrived in the United States and that by virtue of this decree the "Navemar" immediately became and has since remained the property of the Republic of Spain. This, the Ambassador advises the Court, is the law of Spain.

As the Circuit Court of Appeals has pointed out:

> "One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign" (R. 231).

The same doctrine has been stated by Wheaton on International Law at page 168 to be that:

> "Every state claims to exercise jurisdiction over its own merchant vessels wherever they are, and even when they are in the waters of another state."

Professor Holdsworth in an article entitled "The Power of the Crown to Requisition British Ships in a National Emergency" which appears in Volume 35 of the Law Quarterly Review, draws the following conclusion after a careful review of the authorities.

> "* * * it would seem that no distinction can be drawn between a prerogative to requisition a ship in territorial waters and a prerogative to requisition on the high seas" (p. 39).
>
> "It follows, therefore, that the prerogative of the Crown to requisition a British ship is not ousted merely because she is in a foreign port.

> Unless the authorities of the foreign country intervene, the owners of such a ship must obey the requisition, and act illegally if they do not."

In this connection we are not unmindful, and the petitioner has made much of the fact that the doctrine of the territoriality of a vessel is nothing more than a fiction. This has been so held in *Cunard SS. Co. v. Mellon*, 262 U. S. 100, 123, where this Court referred to the statement that a merchant ship is a part of the territory of the country whose flag it flies as "a figure of speech, a metaphor". But we submit that this conclusion is not inconsistent with the recognition of the right of a state to extend its jurisdiction over a vessel of the flag, wherever she may be. There may concededly be circumstances in the confessed practise of nations where the alleged territorial character will disappear whenever a foreign state shall have strong motives for ignoring it. Such undoubtedly would be the case where the vessel itself has infringed the local laws, for as the Court said in *Rex* v. *Lesley* (1860), 29 L. J. M. C. at page 101:

> "Although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof."

See also *The Queen* v. *Anderson* (1868), L. R., 1 Q. C. R. at page 165.

Where, however, no such situation obtains, the exercise of sovereignty over a vessel of the flag in foreign waters must be deemed inviolable. As this Court said in *U. S.* v. *Rodgers*, 150 U. S. 249 at p. 265:

> "The law of nations, as I have stated it, and the statutes of governments founded on that law,

as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but in the ports and harbors or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

And further support for this contention is found in the reasoning in *Cunard SS. Co.* v. *Melton*, 262 U. S. 100, 129, where this Court, after deciding that the operation of the National Prohibition Act by its terms was limited to territorial waters, added:

"In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them." *Lord* v. *Goodall, N. & P. S. S. Co.*, 102 U. S. 541, 26 L. ed. 224; *The Abby Dodge*, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310."

In this view of the case the right of the Republic of Spain to requisition the SS. "Navemar" either on the high seas or in the waters of another state cannot be questioned.

POINT VI.

The United States Circuit Court of Appeals, having reversed the order of the District Court denying the application of the Ambassador to intervene, properly directed the District Court to vacate the decree and dismiss the libel.

After the denial of the second application of the Ambassador for leave to intervene as a party claimant, the Ambassador applied to one of the judges of the United States Circuit Court of Appeals for the allowance of an appeal in accordance with the provisions of Section 132 of the Judicial Code, 28 USCA 228. The appeal was allowed by Honorable Martin T. Manton and the notice of appeal provided that:

> "Petitioner Fernando de los Rios, Ambassador of Spain to the United States of America in behalf of the Republic of Spain, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the default decree entered herein on the 14th day of December, 1936 and from the decisions and orders entered herein on the 4th day of January, 1937 and on the 3rd day of February, 1937, sustaining the exceptions of the libellant and denying the motion to open the default and from each and every part of said decree, decisions and orders as well as from the whole thereof."

The libelant (petitioner in this Court) made a motion in the Circuit Court of Appeals to dismiss the appeal and the Circuit Court of Appeals after hearing argument dismissed the appeal insofar as it related to the default decree of December 14th, 1936 and the first application for leave to intervene.

The Court, however, allowed the appeal from the order denying the second application for the Ambassador to intervene.

While it is, in effect, conceded by petitioner that the Circuit Court of Appeals had the power to reverse the order of the District Court denying the second application of the Ambassador to intervene, it is argued by petitioner that the Court had no power to direct the District Court to enter an order dismissing the libel. The substance of petitioner's argument is that since the appeal from the final decree has been dismissed, that decree was not before the Circuit Court of Appeals for review and hence the Court was without power to direct a dismissal of the libel and that at most the Court should have directed that the Ambassador be permitted to file claim and establish, if he could, the facts set forth in the suggestion and affidavit filed by him.

The language of the Circuit Court of Appeals in its opinion is as follows:

> "Order reversed with directions to enter an order dismissing the libel."

Counsel for petitioner criticizes this decision as follows:

> "Apparently the Court took this action on the theory that the allegations made by the Ambassador were conclusive upon it and that it had no power to inquire into the truth or falsity of these allegations" (Petitioner's Brief, Point I, A, pp. 8-11).

To criticize this action of the Court is ill-founded under the authorities heretofore discussed, and we

submit that the procedure of the Circuit Court of Appeals was in all respects proper.

Having reversed the order of the District Court denying the Ambassador's second application to intervene, the Circuit Court, in effect, opened the way for the filing of the Ambassador's suggestion and claim to the "Navemar". The allegations of that suggestion the Court felt constrained to accept as conclusively establishing the fact of ownership, control and possession of the vessel by the Spanish Government. Since that was the only proof which the Ambassador would have needed to offer, the course of the Court was clearly dictated.

Furthermore, the Court had before it libelant's own proof adduced in the District Court which established that the "Navemar" was in fact in the actual possession of the Republic of Spain, at the time of the vessel's arrival in New York. In addition, the District Court had found in its opinion on the second application of the Ambassador to intervene that all of the material allegations and proof were before the Court (R. 172). Consequently, the Circuit Court was apprised of the details of the subject matter of the suit and of all the elements necessary to a final determination on the jurisdictional question involved.

To thereafter resort to the procedure contended for by petitioner herein would have served no effective purpose. If the order on mandate had been entered in due course by the District Court, it would have been provided, in accordance with the prayer for relief in the Ambassador's second application, that the final decree be vacated and the Ambassador be permitted to file his claim and suggestion. On well settled principles the District Court would then have been bound to accept the allegations of the sugges-

tion as conclusive and could not have inquired by contentious testimony whether the representations therein were correct or not. *The Parlement Belge*, 5 P. D. 197. Thereupon the only recourse of the District Court would have been to dismiss the libel for want of jurisdiction.

We submit that petitioner's argument is founded neither on reason nor convenience, and that the Circuit Court of Appeals properly advised the District Court in directing that the decree be vacated and the libel dismissed.

CONCLUSION.

The United States Circuit Court of Appeals for the Second Circuit has correctly applied the principles heretofore discussed, and therefore the order of the Circuit Court of Appeals reversing the order of the District Court and directing that the libel be dismissed, should be affirmed, with costs.

Respectfully submitted,

CHARLES W. HAGEN,
HORACE T. ATKINS,
JESSE L. ROSENBERG,
JOHN S. BULL.

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APPENDIX A.

Article XXIII of the Treaty of Friendship and General Relations between the United States of America and Spain; Statutes at Large, 33 Stat. (Part 2) 2105.

"Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall

be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers."

(Note) Article XXIII of this Treaty was abrogated as of July 1, 1916 insofar as its provisions are in conflict with the Act of Congress approved March 4, 1915 (Seamen's Act), 38 Stat. 1164, 1184; Foreign Relations of the United States, 1915, pages 6 and 10; ibid., 1916; 33; 1918, pages 3 and 10, and 1919 (Vol. 1), pages 54-67. This limited abrogation does not affect the subject matter of this proceeding.

APPENDIX B.

Admiralty Rule 12 of the United States District Court for the Eastern District of New York.

12. Verification of Pleadings and Interrogatories.

Verification of pleadings and answers to interrogatories shall be by the parties or one of them if within the City of New York; otherwise by an agent, attorney-in-fact or proctor, who shall state briefly the sources of his knowledge or information, declare that the document affirmed to is true to the best of his knowledge, information and belief, and state the reason why the verification is not made by a party. If the personal oath of a party or all the parties be demanded, a motion may be made for a stay pending the procurement of such verification by commission or otherwise.

APPENDIX C.

Petitioner argues that, because of the fact that petitioner has paid certain sums to the members of the crew of the "Navemar" for wages earned during the voyage from Buenos Aires to New York, therefore it has been established that the ship had been operated by the libelant (petitioner in this Court). For the information of the Court, we submit the following resume of the facts leading up to the payment of these wages.

Although the libel in this case was brought against only five named respondents, the decree of the District Court entered on default, provided as follows:

> "Further, Ordered, Adjudged and Decreed, that any and all persons now on board the Spanish Steamship 'Navemar' who claim any interest in her adverse to the libellant or whom the libellant desires to have removed from the said Spanish Steamship 'Navemar' be and they hereby are directed to leave the Spanish Steamship 'Navemar'."

Thereafter libelant (petitioner in this Court) requested all of the loyal officers and members of the crew of the "Navemar" to leave the ship. This the men refused to do. Thereupon libelant obtained an order to show cause why the men should not be punished for contempt of Court. The men were removed from the vessel by the United States Marshal and brought before the District Court. The Court refused to punish them for contempt 17 Fed. Supp. 495, but the United States Marshal has since refused to permit these officers and men to return to the "Navemar". The men were left in a strange port without funds and without their own belongings. They thereupon filed a libel against the ship for wages and transportation to Spain.

On February 3rd, 1932 a restraining order was issued by the Circuit Court of Appeals, whereby all further proceedings in this case including release of the vessel by the United States Marshal was forbidden by the Court. Despite this restraining order, the Spanish corporation, claimant in the wage suit, on February 4, 1937 consented to a decree in favor of the wage claimants and forthwith paid the amount of this decree (R. 222-225).

In its brief, petitioner now argues that because of these actions by petitioner after this case was lodged in the Circuit Court of Appeals, this Court should draw the conclusion that the seamen of the "Navemar" were in fact in the employment of the libelant. The consent decree in the wage suit and the prompt satisfaction of the decree was accomplished while the question of title to the "Navemar" was at issue in the courts of the United States. No inference adverse to the Republic of Spain can be drawn from the voluntary action of the petitioner in consenting to a default decree in a suit to which the Republic of Spain was not a party.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 242

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., OWNER OF THE SPANISH STEAMSHIP "NAVEMAR",

Petitioner,

against

SPANISH STEAMSHIP "NAVEMAR", HER ENGINES, ETC., AND RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ AND ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, AMBASSADOR OF THE REPUBLIC OF SPAIN, APPLICANT,

Respondent in this Court.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

CHARLES W. HAGEN,
HORACE T. ATKINS,
JESSE L. ROSENBERG,
JOHN S. BULL,
Counsel for Respondent.

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Respondent in this Court.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

At the argument we called attention to a recent decision of the Court of Appeal of England in the "Cristina" which at present is reported only in Volume 59, Lloyd's List Law Reports, pages 47 to 51, inclusive, and which we have re-

printed for the convenience of the Court. The only citations of this case in the Court of Appeal and in the lower court are as follows:

The "Cristina" and other vessels, Volume 59 Ll. L. Rep. 1. (Decision of the lower court, Admiralty Division, rendered October 15, 1937.)

The "Cristina" and other vessels, Volume 59 Ll. L. Rep. 47. (Decision of Court of Appeal, rendered November 8, 1937.)

The Court of Appeal refused to allow an appeal, but the Appeal Committee of the House of Lords has consented to hear the case. This appeal will be heard by the House of Lords on January 14 or 15, 1938.

The facts and proceedings in the "Cristina" are in all material respects similar to those in the case which this Court is now considering, except that the seizure of the "Cristina" took place in the territorial waters of Great Britain (Cardiff, Wales), whereas the "Navemar" was in the actual possession of the Republic of Spain before the vessel had arrived in the territorial waters of the United States (Opinion, C. C. A., R. 232).

The procedure of the Ambassador of Spain in attempting to raise the jurisdictional question parallels in every respect the procedure of the Spanish Ambassador to Great Britain in the case of the "Cristina".

In the latter case the motion of the Spanish Government "was started by two affidavits, sworn by the Counsellor of the Spanish Embassy." In these affidavits it was alleged that the "Cristina" had been requisitioned by the Spanish Goverment under a decree issued at Valencia on June 28, 1937; that the decree had been signed by President Azana; that by virtue of this decree the Government of Spain claimed and was entitled to possession of the ship under the requisition; that the Government of Spain was unwilling to submit to the jurisdiction of the British Admiralty Court.

We respectfully refer the Court to the material allegations contained in the Suggestion of Fernando de los Rios, Ambassador of Spain to the United States, which are summarized at page 28 of our main brief, and which appear at pages 120 to 126 of the Record.

The proceedings in the present case were started by an affidavit of Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, New York (R. 127) who had been duly authorized by the Ambassador to make these representations (R. 257). In this affidavit it is alleged that the "Navemar" was requisitioned by the Spanish Government under a decree issued on October 10, 1936; that the decree was signed by President Azana (R. 120); that by virtue of this decree the Government of Spain was entitled to possession of the ship under the requisition (R. 124); that the Republic of Spain is a sovereign nation (R. 119) and that the Republic of Spain has never consented that the said Steamship "Navemar" might be proceeded against judicially by libel or otherwise, or that the Republic of Spain itself be subject to the jurisdiction of the court (R. 127).

The principles of law applicable to the situation now under consideration by this Court are well stated in the Judgment of Lord Justice Greer in the Court of Appeal in the "Cristina", 59 Ll. L. 47, 49.

The judgment of Mr. Justice Bucknill in the Admiralty Division in the "Cristina", 59 Ll. L. Rep. 1, 5, which was approved by the Court of Appeal, reads in part as follows:

> "Now, as I have said at the beginning, the Spanish Government, which has taken this action in the matter, is an independent Sovereign State recognised by this country and is so admitted to be by the owners of the ship, and that being so I think it is impossible for this Court to exercise jurisdiction over the Cristina, a ship which they—the Spanish Government—claim to

have requisitioned, to have a right of possession in, and to have taken such steps as were available to the Government actually to be in possession of her, and I think that this writ should be set aside.

"As regards the point that the necessary affidavits have not been made from the appropriate quarter, I am satisfied that the Spanish Government has made this application through its responsible officers and has properly put forward the essential allegations in the case. For that reason I direct that the writ and the arrest be set aside."

The letter of the master of the "Navemar" in which he stated that the ship was in the possession of Spain since October 1936 (Ex. 6 and 7; R. 25) has not been reproduced in the record by petitioner. However the translation (Ex. 7) of that letter (Ex. 6) is correctly quoted at pages 6 and 7 of respondent's brief.

At page 14 of the reply brief on behalf of petitioner, there is a serious error in quotation which must have been unintentional on the part of petitioner's counsel. It is said that respondent conceded in the District Court that the Republic of Spain had "at most only a constructive possession (R. 170)." What counsel has quoted is a conclusion of the District Court which the Circuit Court rejected (R. 232). What we had said in the District Court was that *actual* possession of the vessel had been taken at the time the master was permitted to sail to New York (R. 94) which was on October 28, 1936, when the vessel was at Buenos Aires (R. 95). The very fact that a possessory libel was filed would seem to indicate that the "Navemar" was in the actual and not constructive possession of the Republic of Spain.

Respectfully submitted,

CHARLES W. HAGEN.

APPENDIX.

LLOYD'S LIST LAW REPORTS.

Nov. 25, 1937.

COURT OF APPEAL.

Monday, Nov. 8, 1937.

The "Cristina" and Other Vessels.

Before Lord Justice GREER, Lord Justice SLESSER and Lord Justice SCOTT.

International law—Ship—Arrest of Spanish steamship Cristina by owners—Writ in rem—Motion by Spanish Government to set aside writ and arrest—Plea that Spanish Government by decree had requisitioned the vessel, and that the owners' writ thereby impleaded the Spanish Government and must therefore be set aside—Vessel outside Spanish territorial waters at time of decree—Extraterritorial jurisdiction of Sovereign State.

———Held, that the Admiralty Court was bound to accept as conclusive the declaration made by the Spanish Government, which was recognised by His Majesty's Government as an independent Sovereign State, that the decree of requisition issued by the Spanish Government was intended to apply to the Cristina and that they had taken such steps as they could to take possession of the vessel in accordance with their decree before the owners' writ was issued, and that as the Spanish Government had not consented to an order being made against them, the writ and arrest must be set aside.

———Appeal dismissed.

This was an interlocutory appeal from a judgment of Mr. Justice Bucknill (p. 1 *ante*) upholding a motion on behalf of the Spanish Government to set aside the writ and all subsequent proceedings by the owners in the cases of the Spanish steamships *Cristina*, *Arraiz* and *Marques de Urquijo*, on the ground that the vessels had been requisi-

tioned by the Spanish Government, and that these proceedings impleaded that Government as being a foreign Sovereign State, recognised by H. M. Government as such.

The owners of the vessels, which were lying in South Wales ports, had issued writs claiming possession of them, and at their instance the Admiralty Marshal had arrested the vessels.

Mr. Justice Bucknill, holding that the applicants were a Sovereign State, said that it was impossible for the Court to exercise jurisdiction over those vessels, and he accordingly set aside the writs and the arrests.

Mr. G. St. Clair Pilcher, K. C., and Mr. O. L. Bateson (instructed by Messrs. Petch & Co.) appeared for the Spanish Government; Mr. H. U. Willink, K. C., and Mr. H. G. Willmer (instructed by Messrs. Ince, Roscoe, Wilson & Glover) represented the owners of the *Cristina,* the *Arraiz* and the *Marques de Urquijo.*

Mr. WILLINK said that the appeal was from an order of Mr. Justice Bucknill setting aside the writ for possession and the arrest of the steamship *Cristina,* the property of the appellants. The ground of Mr. Justice Bucknill's order was that it impleaded a foreign Sovereign State. Counsel understood that there were many other vessels with regard to which the facts were similar to those of the *Cristina,* but those facts were not before the Court. The plaintiffs were the owners of the vessel, with head offices at Bilbao.

Lord Justice SCOTT: Are they still carrying on there?

Mr. WILLINK: What is going on in Bilbao at the present time is a little obscure. There are grave difficulties with regard to business in such a port. There are 20 or 30, or possibly more, ships in a similar position to that of the *Cristina,* and this case is a test action, although the facts may not be exactly the same. There is no dispute that the *Cristina* is the property of the plaintiffs, and they are claiming something which is admittedly their own property. The *Cristina* is now at Cardiff, and she has been there since some date in June or early July. To make it a little more precise, I think I should point out that the *Cristina* has not been within Spanish territorial jurisdiction at any time since June 28 of this year. On June 28 she was outside Spain and

Spanish territorial waters and has never been in Spanish territorial waters since that date. That is a matter of agreement between the parties. On June 28 a decree was issued at Valencia, signed by the President, I think, of the Spanish Government and one of his Ministers, requisitioning all vessels registered at Bilbao. I do not think there is any dispute in the ordinary way that under the ordinary principles of international law a requisitioning decree has no effect outside the territorial jurisdiction of the requisitioning State. That decree of June 28 was officially published in the "Gaceta" on the following day. The substance of it was that in the situation in which the Spanish Government found itself it was essential that they should have control of the means of transport.

Lord Justice SCOTT: A requisition does not import a change of property.

Mr. WILLINK agreed, but added that the effect of the requisition would depend upon what was done upon the requisition. The owner would have to do what he was told.

COUNSEL went on to say that on June 30 some communication evidently passed between the Spanish Government and that country's Consul-General in London. He wrote to the Spanish Consul in Cardiff. The effect of it was this: "It is for you to see that the owners do nothing with regard to the *Cristina,* and a list of some 58 ships. With regard to the 58 ships you are to see that no one acting on behalf of the owners shall interfere with them." All the captains on the register at Bilbao were to be directed to produce their papers to him. This communication was a kind of circular letter sent to all Spanish Consuls round the coast.

It so happened, continued COUNSEL, that the *Cristina* came to Cardiff on July 9, and the captain, so far as the evidence went, presented himself to the Spanish Consul in the ordinary way to report. In ignorance of the instructions the Consul had received he was handed a letter ordering him to bring any ship's papers for endorsement by the Consul to the effect that the vessel had been taken over and attached by the Spanish Government and Republic. The captain did not quite appreciate that that was a desirable course as he thought it would not be the desire of the owners. He took

the view that the decree had no effect on a vessel which had not been in Spanish territorial waters, and that he was not bound to put his vessel under the direction of the Spanish Republican Government if his owners did not desire to do so. He did not obey the instructions of the Consul and did not bring the ship's papers. Thereupon the Spanish Consul reported it to the Spanish Consul-General in London. The Spanish Consul-General said: "Dismiss him and hand over the ship to another merchant officer."

COUNSEL thought that the Consul at Cardiff had instructions to dismiss any other officers or members of the crew who were not inclined to follow the course indicated by the Spanish Consul. On July 13 the Consul wrote to the captain purporting to dismiss him and dismiss all officers and members of the crew who were not in sympathy with the Spanish Republican Government. In that letter he said, "I trust everyone will behave reasonably and no incidents will take place on board. If they do, the responsibility will fall on you (the captain)." Having written that somewhat remarkable letter and having taken that course—and one might imagine that it was well calculated to provoke disorder in the territory of his Majesty—he reported it to the Consul-General, and, he said, to the Spanish Ambassador. On the following day the Spanish Consul went on board the *Cristina* with a gentleman whom he described as Asolo, the new captain. The true captain not being on board, the Spanish Consul at Cardiff proceeded forcibly to open the captain's cabin, but did not find the ship's papers. The third officer of the *Cristina* was promoted chief officer. In those remarkable circumstances, said Counsel, it was not surprising that on July 22 plaintiffs issued a writ for the possession of their steamer, which was being held from them by a captain and others appointed by the Spanish Consul.

Those were the broad facts. COUNSEL knew that terrible things must happen in Spain during the civil war, but there was no reason why such conduct should be extended and take place in England.

COUNSEL proceeded to read the affidavits and documents and the judgment of Mr. Justice Bucknill. He contended that the action of the Consul was likely to provoke disorders

and breaches of the peace. The Spanish Embassy and the Consulate-General had embarked on an extraordinary course of conduct with regard to the *Cristina*, and the question was whether international comity applied in such a case where the steps which had been taken were likely to lead to scenes of disorder and bloodshed in British ports. A foreign State need not be a defendant unless it wanted to be. Further, the case was a difficult one on the facts, and where they were so extreme he thought the Court should not assume what were the principles of international comity.

Mr. Pilcher was not called upon to reply.

JUDGMENT.

Lord Justice GREEN: This is an appeal from an order of Mr. Justice Bucknill setting aside the writ for possession and the arrest of a vessel called the *Cristina*.

The *Cristina* is a vessel belonging to a company which is now carrying on its business at Marseilles and sailing its ships from Marseilles. At no material time was the vessel with which we are dealing within the jurisdiction or within the territorial waters of the Spanish Government, but I think, as will appear in a moment, that that is wholly irrelevant to the question we have to determine. There can be no doubt that certain decrees were passed by a body which may or may not have had in the Constitution of Spain power to make those decrees, so that the decrees became law. There is a dispute about that, and there is some evidence which was before the learned Judge, and before us, to the effect that those decrees were entirely unconstitutional, but I do not think that that has any bearing upon the question we have to decide.

When this vessel, the *Cristina*, arrived in Cardiff, possession was taken, rightly or wrongly—it does not seem to me to matter—by the Spanish Government, and they claim, in answer to the claim of the ship-owners, to retain the possession which they have already taken. It was frankly admitted by Mr. Willink for the ship-owners that it is immaterial to our decision whether the Government of Spain claim to be the owners of the vessel, or whether they only claim to have a right of possession, the question being not

what was the nature of their claim, nor whether that claim was one on which they were likely to succeed, but whether they had or had not in fact submitted to the jurisdiction of this Court. Mr. Willink, in a bold argument, desired us to say that by reason of their conduct in seizing the vessel contrary to recognised principles of good international manners, we could not give effect to the rules which have been laid down so frequently with regard to the powers of the Courts of Justice in this country to make orders binding upon foreign Governments.

In my judgment, the case is entirely within the decision in the *Jupiter*, [1924] P. 236.* A claim was made by the owners for possession against somebody whom they alleged had interfered with their possession. The only people who had interfered with their possession was the Government of Spain, in the present case. Accordingly, they cannot succeed in their action *in rem* unless they are entitled to get an order against the Government of Spain. The Government of Spain says, in so many words: "We do not consent to the jurisdiction of the English Courts to make an order against us." Under those circumstances, I think there is ample authority for the proposition that the right order to make is the order which the learned Judge made.

In the course of his judgment in the *Jupiter*, Lord Justice Bankes, referring to the decision in the *Gagara*, [1919] P. 95, said, at p. 242:*

> In my opinion, that is contrary to all the principles upon which this Court has acted where a claim is made by a duly recognized independent Sovereign State. It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title, and to have the question of the ownership, or the right to possession of this vessel, litigated in the Courts of this country.

That is what the plaintiffs are claiming here, that the right to possession of the *Cristina* shall be litigated in the Courts of this country. On the authority of the *Jupiter* and

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* 19 Ll. L. Rep. 325.

many other cases, that cannot be done. The rights of the owners and the rights of the crew, if there are any, must be asserted by diplomatic pressure, and cannot be asserted by a judgment of this Court.

For these reasons, I think the appeal should be dismissed, with costs.

Lord Justice SLESSER: I agree, and have only to add a short observation with regard to one point. Mr. Willink sought to distinguish this case from the case of the *Jupiter*, which I agree with my Lord entirely binds us in this present matter. He sought to say, as I understood him, that because of alleged improprieties on behalf of the Government which was claiming to be exempt from the jurisdiction of the Court—allegations about which I say nothing, whether they be well founded or not, for it is not for us to consider that matter—the comity of States which normally supports the exclusion of the right of action against the Sovereign Power should not prevail. I think that argument is not well founded, and I would only add this, that it is a recognised principle of law that the exemption of a foreign State from suit extends to cases where there is alleged a violation of a legal right, such as a tort, as well as in cases of contract, showing to my mind that whether the particular act done is or is not a wrongful one from the point of view of English law, the degree of the wrongfulness, whether, as in one case, it extends to a breach of promise of marriage, or, in another case, to an actual tort, is immaterial, that the exemption is absolute, and that the consideration which Mr. Willink urged is not one which this Court is justified in considering.

Lord Justice SCOTT: I agree with the judgments delivered, but think that the simplest way of stating the position is that before the writ was issued in this case, this vessel was already in the actual possession of the Spanish Government. Consequently that possession could not be displaced without an order of the Court upon the Spanish Government. That order, for the reasons given by my brothers, could not be made unless the Spanish Government consents that it should be made. It does not so consent, and the Court has, therefore, no jurisdiction in the matter, and must, in accordance

with the rule of comity, set aside the write as done by Mr. Justice Bucknill.

Mr. PILCHER: Your Lordships will dismiss the appeal, with costs?

Lord Justice GREER: Yes.

Mr. PILCHER: And the order will be that the writ and the arrest, and all subsequent proceedings, be set aside?

Lord Justice GREER: The order will remain as made by the learned Judge. The stay will be removed, of course.

Mr. WILLINK: May I make an application to your Lordships which will have a contrary result. On the matter as it stands at the moment, that, of course, would be so on the learned Judge's order. The arrest was only to remain effective until the appeal was heard. I did say to your Lordships, I hope correctly, that the limits of this principle have not been considered by the House of Lords. I should submit that this case is just such a case as would be suitable for an appeal to the House of Lords, and I would ask your Lordships' leave to appeal from this order, in view of what I have said, not that I am desirous of criticising in any way what your Lordships have said with regard to the *Jupiter*, but a matter of this kind should, in my submission, be considered by the supreme tribunal, and this is a case of such seriousness that it is a suitable one for an appeal. As I understand the position, there are a large number of cases in which vessels are held where there have been similar proceedings to these, and those proceedings are abiding the result of this case. If the House of Lords takes a contrary view, if the arrests have gone, and the ships are free, they may have gone to positions of extreme danger.

Lord Justice SLESSER: You, on your view, would want a stay until the House of Lords has reached a decision, otherwise the birds will have flown.

Mr. WILLINK: Yes, my Lord, and very likely have been blown up. I would ask your Lordships' leave to appeal to the House of Lords, and for the stay to be continued.

Lord Justice GREER: The two questions are independent?

Mr. WILLINK: Yes, my Lord.

Lord Justice GREER: I think it is quite a proper case for you to take the view of the House of Lords on the question,

but whether we should stay the order of the learned Judge in the meantime is quite another matter. We were asked to hear this case because it was necessary to have a quick decision. When you go to the House of Lords you will not get a quick decision.

Mr. WILLINK: No, my Lord, in the ordinary case, but my friends would no doubt take all necessary steps to get as quick a decision as possible.

Lord Justice GREER: Mr. Willink, we think the best thing we can do for you is to refuse you leave to appeal, but to say that you can say to the Committee that our reason for refusing it was that we did not anticipate that it could be heard quickly, and if you get an order for expedition then we encourage you to ask the House of Lords for leave to appeal with such expedition as they think they ought to give you. I think it will be better for you than giving you leave to appeal.

Mr. WILLINK: The only difficulty, if I may just mention it, is this: that in that situation this boat, and many other boats, will presumably sail to-night unless there is some short prolongation of the stay during which I can reach the Committee of the House of Lords. Would it be possible for your Lordships to give me an opportunity of finding out between now and the rising of the Court, the sittings of the Committee, so that then I can make an application for a short stay?

Lord Justice GREER: Very well.

[*A short adjournment.*]

Mr. WILLINK: Inquiries have now been made, and it is impossible to ascertain a definite time when the Committee of the House of Lords will deal with this matter. I was wondering whether your Lordships would maintain the stay for a week while we make further inquiries as to when our application to the House of Lords for leave to appeal and to maintain the arrest can be heard.

Lord Justice GREER: We are inclined to give a week's grace.

Mr. PILCHER: I do not wish to seem unreasonable, but one cannot blink one's eyes to actualities in this case. Your

Lordships remember that when I applied to accelerate the appeal to this Court the application was resisted, apparently for no reason at all as it turned out, although we had understood that both parties were anxious to get the matter disposed of, and we hoped finally disposed of. Here we have, on my friend's showing, something in the neighbourhood of £2,000,000 of shipping immobilised, and immobilised since last July. This is an extremely important matter.

Lord Justice GREER: If they are immobilised for another week it will not make much difference.

Mr. PILCHER: I do not think a week is unreasonable, but I should ask your Lordships to make it a week, and no more, because the matter, as I say, has dragged on a very long time already.

Lord Justice GREER: My idea was that we should adjourn the decision on the question as to whether we should give leave to appeal until another week has passed. When another week has passed Mr. Willink will be able to tell us whether he wants leave to appeal or not.

Mr. WILLINK: That is another way of putting it that has exactly the same effect. All I am asking is that the arrest shall be maintained until next Monday. What I shall in fact be doing during the week will be finding out when I can get the matter before the House of Lords.

Lord Justice GREER: We have come to a decision on the matter in which all three members of the Court are agreed, namely, that leave to appeal should be refused, but that there should be a stay for a week in order to see whether Mr. Willink can get on behalf of his clients the leave of the House of Lords to appeal upon such terms, expediting the matter or otherwise, as regards which he may satisfy the Committee.

Mr. WILLINK: If I find in the course of this week that the Committee might sit at the end of another week, I would come to your Lordships next Monday or next Friday, and ask for the stay to be extended for another week.

Lord Justice GREER: Yes, you can, but do not be too hopeful.

Mr. PILCHER: There are two other cases which do not appear in your Lordships' list to-day, but which were be-

fore Mr. Justice Bucknill, and I think similar orders were made with a similar condition as to a stay pending appeal. Notices of appeal were entered in all three cases, and all three cases did appear in the original draft list, but I understand that only the *Cristina* appears in your Lordships' list to-day. We should require a similar order in both of the other cases.

Lord Justice GREER: Very well, there will be a similar order in the other cases.

Friday, Nov. 12, 1937.

Mr. WILLINK stated that it had been ascertained that in view of the urgency of the matter the House of Lords Committee would sit on Monday, Nov. 22, to consider an application for leave to appeal.* In those circumstances Counsel asked the Court to continue the arrest of the *Cristina* until Nov. 24, so that, if necessary, he could come back to the Court and ask for an extension of the arrest.

The application was opposed by Mr. PILCHER.

Lord Justice GREER said that the Court would continue the stay until Nov. 24. His Lordship added: "I cannot help thinking that the time has come when it is desirable that there should be some revision of this question as to when and in what circumstances effect will be given to the usual rule that a foreign Government cannot be impleaded in this country."

* The Court of Appeal was subsequently informed that the House of Lords Committee had granted leave to appeal and had intimated that the appeal would be heard on Jan. 14 or 15, 1938. The Court therefore ordered the stay to continue until after the hearing of the appeal.

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SUPREME COURT OF THE UNITED STATES.

No. 242.—October Term, 1937.

Compania Espanola De Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Petitioner, *vs.* Spanish Steamship "Navemar", Her Engines, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 31, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

In a suit in admiralty, brought in a district court by the alleged owner to recover possession of a Spanish merchant vessel, the Spanish Ambassador asked leave to intervene as claimant on the basis of an affidavit of the Spanish Acting Consul General suggesting that when the suit was brought the vessel was the property of the Republic of Spain, by virtue of a decree of attachment promulgated by the President of the Republic, appropriating the vessel to the public use, and that it was then in the possession of the Spanish Government. The principal question for decision is whether it was the duty of the court, upon presentation of the suggestion, to dismiss the libel for want of admiralty jurisdiction.

Petitioner, a Spanish corporation, brought the present suit in admiralty in the district court for eastern New York against the Spanish steamship "Navemar", five members of her crew, and all persons claiming an interest in her, to recover possession of the vessel. The libel alleged that petitioner was owner of the vessel, which was within the territorial jurisdiction of the court; and that while she was in petitioner's possession the individual respondents, acting as a committee of the crew, had wrongfully and forcibly seized, and had since retained possession of the vessel. After hearing evidence in support of the petition, the district court rendered its decree upon default, directing the marshal to place libelant in possession.

Thereupon the Spanish Ambassador filed a suggestion in the cause, challenging the jurisdiction of the court on the ground that the "Navemar" was a public vessel of the Republic of Spain, not subject to judicial process of the court, and asking that it direct delivery of the vessel to the Spanish Acting Consul General in New York. The suggestion alleged that when the suit was brought the "Navemar" was the property of the Spanish Government by virtue of its decree of October 10, 1936, and was in the possession of the Republic of Spain. The district court issued its order to show cause why the default should not be opened and the Ambassador permitted to appear specially as claimant of the vessel. After a hearing the court denied the application but with leave to the Ambassador to make further application upon fuller presentation of the facts showing the ownership and possession of the vessel by the Spanish Government.

Meanwhile the Department of State had refused to act upon the Spanish Government's claim of possession and ownership of the "Navemar", had declined to honor the request of the Ambassador that representations be made in the pending suit by the Attorney General of the United States in behalf of the Spanish Government, and had advised the Ambassador that his Government was entitled "to appear directly before the court in a case of this character."

A second application by the Ambassador for leave to appear as a claimant upon a verified suggestion, stating additional circumstances relied upon to establish possession of the vessel by the Republic of Spain, was denied. 18 Fed. Supp. 153. On appeal the Court of Appeals for the Second Circuit, after restricting the appeal to the order of the district court on the second application, reversed that order and directed that the libel be dismissed. 90 F. (2d) 673. We granted certiorari, — U. S. —, because the case is of public importance and because of alleged conflict of the decision below with our decision in *The Pesaro,* 255 U. S. 216, and with that of the Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909.

Respondent's suggestion on the second application presented two contentions: one, a challenge to the jurisdiction on the ground that the "Navemar" was a public vessel, immune from arrest and process of the court; the other, that the Spanish Government was owner of the vessel and entitled to her possession by virtue of the decree of attachment.

In addition to the general allegations of ownership and possession of the vessel by the Spanish Government in the first application, the suggestion in the second set up the acquisition of possession in behalf of the Spanish Government by specific acts of its consular officers in Argentina and in New York. It alleged that on October 26, 1936, the Spanish Consul at Rosario, Argentina, had endorsed on the ship's roll a statement that "Through a cable dated 26 of the inst month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936", and that on October 28 the Spanish Acting Consul General at Buenos Aires had made a similar endorsement on the ship's register. It was also alleged that on arrival in New York in November the Spanish Acting Consul General at that port, by direction of the Ambassador, had instructed the master of the "Navemar" "to await and abide further instructions . . . as regards any further use of the" vessel, and that on November 28 he had instructed the master to render a detailed account of the expenses of the "Navemar" and of minor repairs that she might require. There was no averment that the alleged seizure by the members of the crew was an act of or in behalf of the Spanish Government.

The district court allowed a full hearing upon the suggestion and upon reply affidavits submitted by libelant, in the course of which there was opportunity for the parties to present proof of all the relevant facts. Cf. *Ex Parte State of New York, No. 2,* 256 U. S. 503. The court found that no one had taken possession of the "Navemar" in behalf of the Spanish Government. It pointed out that neither the ship's roll nor its register is a document of title or possession, the ship's roll being merely a record, in the case of Spanish vessels usually deposited with the Spanish consul while in port, showing arrivals and sailings of the vessel, the kind of cargo carried, the list of passengers, and the enrollment of the members of the crew, and the ship's register being only a record of the nationality of the vessel as determined by the place of her home port. It found that none of the consular officers mentioned had done any act purporting to take possession of the vessel; that none of them had informed the master that he wished to take possession or had any intention of doing so; that the vessel had pro-

ceeded under command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of petitioner; that upon arrival, the master, under direction of the ship's agent, had discharged cargo; and that before discharge the freight money was paid by the consignees to the agents of the time charterer in New York.

The district court, upon this and other evidence not necessary to detail, concluded that the "Navemar" was never in possession of the Spanish Government before her seizure by the members of the crew in the territorial waters of the United States, and that she was not a vessel in the public service of the Spanish Government.

The Court of Appeals, without reviewing the findings of the district court, or the evidence, adverted to the allegation of the first suggestion, substantially repeated on information and belief in the second, that the Spanish Consul at Rosario "pursuant to instructions from the Director General of the Spanish Merchant Marine, took possession of the . . . Navemar in the name of the Republic of Spain . . . whereby the . . . Navemar then and there became and at all times since has remained the property of the Government of the Republic of Spain." Declaring that the court was bound to accept this allegation as conclusive, it held that the vessel must be taken to be a public vessel owned by and in the possession of the Spanish Government, and as such immune from suit in the courts of the United States.

This we think was a mistaken view of the force and effect of the suggestion. Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562; compare *The Exchange,* 7 Cranch 116. And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.

If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United

States, or other officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange, supra; The Pizarro,* 19 Fed. Cas. No. 11,199; see *The Constitution,* L. R. 4 P. D. 39; compare *Ex Parte Muir,* 254 U. S. 522; *The Parlement Belge,* L. R. 4 P. D. 129. The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. *The Sapphire,* 11 Wall. 164, 167; *The Anne,* 3 Wheat. 435, 445-446; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Columbia* v. *Cauca Co.,* 190 U. S. 524; *Ex Parte Transportes Maritimos,* 264 U. S. 105; *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*

After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course. His application to be permitted to appear and present the claim was properly entertained by the district court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government. *Ex Parte Muir, supra; The Pesaro, supra. Berizzi Bros. Co.* v. *S. S. Pesaro, supra,* did not hold otherwise for there it was stipulated that the vessel, when arrested, was owned, possessed and controlled by a foreign government and used by it in carrying merchandise for hire. The sole question was one of law, whether, upon the facts stipulated, the vessel was immune from suit.

The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the "Navemar" had been in the possession of the Spanish Government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree

was *in invitum,* actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, *The Davis,* 10 Wall. 15, 21; *Long* v. *Tampico,* 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma,* 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.[1] Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long* v. *Tampico, supra,* 493, 494; cf. *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*

The district court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction. But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the Ambassador should have been permitted to intervene and, if so advised, to litigate its claims in the suit. In *Ex Parte Muir, supra,* and in *The Pesaro, supra,* 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but did not place himself or his Government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised.

The decree of the Court of Appeals will be reversed. The respondent will be permitted to intervene for the purpose of asserting the Spanish Government's ownership and right to possession of the vessel, and the order of the district court will be modified accordingly.

So ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[1] In The Jupiter, 1924 P. 236, 241, 244 (compare The Jupiter No. 2, 1925 P. 69; The Jupiter No. 3, 1927 P. 122, 125), and in the recently reported The Cristina, 59 Lloyd's List Law Reports 43, 50, on which respondent relies, the possession taken in behalf of the claimant government was actual. The judgment in The Cristina appears to have proceeded on that ground. In The Jupiter, it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. The report of The Cristina in the Admiralty Division, 59 Lloyd's List Law Reports 1, 3, indicates that the master and crew were in the pay of the Spanish Government.